

The Savage Republic

The Savage Republic:

De Indis of Hugo Grotius,
Republicanism, and Dutch Hegemony
within the Early Modern World-System
(c. 1600-1619)

by
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For Selina,
who was there, to help me get through,
those hard time, killin' floor
blues.

‘How much blood and horror lies at the basis of “all good things”!’—Nietzsche

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Preface

This book is an interpretative essay. Although not originally conceived within, the greater part of it was written under the shadow of the Second Gulf War that so disturbed the dogmatic slumbers of mainstream international legal scholars, reminding them that even the most punitive forms of uni-lateralism were neither dead nor obsolete. The aggression worked against Baghdad, which precipitated the first systemic crisis of the contemporary international legal order, unambiguously demonstrated the veracity of Detlev F. Vagt's notion of "hegemonic international law";¹ that International Law is the expression of an underlying international public order the internal structure of which is grounded upon implicitly hierarchical principles of primacy and subordination.² Writing in the *Spectator* during the commencement of hostilities, Richard Perle, one of the senior architects of the 'neo-conservative' movement in Washington, went so far as to declare the effective death of multilateralism: 'As we sift the debris of the war to liberate Iraq, it will be important to preserve, the better to understand, the intellectual wreckage of the liberal conceit of safety through international law administered by international institutions.'³ In an even more disarmingly honest manner, Michael Ledeen, the holder of the Freedom Chair at the American Enterprise Institute, openly confessed that 'Every ten years or so the United States needs to pick up some small crappy little country and throw it against the wall [in order] to show the world that we mean business.'⁴ Sentiments such as these defy con-

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- 1 Detlev F. Vagts, 'Hegemonic International Law', *American Journal of International Law*, 95/4 (2001), 843–48, *passim*.
 - 2 Jose E. Alvarez, 'Hegemonic International Law Revisited', *American Journal of International Law*, 97/4 (2003), 873–88, *passim*; John Quigley, 'The United Nations Security Council: Promethean Protector or Helpless Hostage?', *Texas International Law Journal*, 35 (2000), 129–72, *passim*; Henry J. Richardson III, 'U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq', *Temple International and Comparative Law Journal*, 17 (2003), 27–83, *passim*.
 - 3 Cited in David Keen, *Endless War? Hidden Functions of the 'War on Terror'* (Pluto Press: London, 2006), 136.
 - 4 Cited in Amy Bartholomew, 'Introduction', in Bartholomew (ed.), *Empire's Law: The American Project and the 'War to Remake the World'*, (Pluto Press: London, 2006), 1–17 at 6.

ventional legal theory; they bring to mind Gerry Simpson's ironical comment on the recent work of Thomas Franck that 'International Law had barely escaped its "ontological" phase when it was promptly declared dead.'⁵

My own growing awareness of the ideologically blinkered nature of mainstream, or 'Liberal', international legal scholarship—its systematic failure to conceptualise the internal juro-political logic of the international society governed by the rule of law as grounded upon a systemic but informal institutionalisation of the legal inequality of States—led me to wider critical reflections of problems of international jurisprudence and governance through the prism of hegemony. This, in turn, drew me to the work of Immanuel Wallerstein and World-System Analysis as an alternative means of formulating a coherent description of the international society that invests the meta-normative legal principle of *ubi societas, ibi ius*. And this, finally, caused me to undertake a full-scale revisionist reading of the alleged 'father' of International Law, Hugo Grotius (1583–1645). As I speedily came to appreciate, World-System Analysis provided an ideal means through which to critically re-evaluate that amorphous construct generically known as either the 'Grotian Heritage' or the 'Grotian Moment'. By postulating the Dutch Republic as both the World-System's first 'true' hegemon as well as the point of emergence of modern, or 'post-primitive', international legal scholarship, Wallerstein's school invites the critical legal scholar to invest Grotius with the very highest degree of world historical significance; World-System Analysis makes Grotius 'good to think'.

This work is anti-teleological and anti-originary; necessarily so, as 'purpose' is, mistakenly, commonly reduced to 'origin'. In no sense is it argued that Grotius, as author, intentionally strove to give conscious expression to a newly emergent 'Modern' and/or 'Colonial' World-System. Rather, repeatedly throughout the corpus of his early writings, the 'juvenilia' (c.1600–1619), he is reflecting through of the two discourse apparatuses of greatest contemporary concern—Dutch Sovereignty and Dutch Republicanism—the internal structure of the wider juridical framework that enconced the nascent United Provinces. In his most important early work—which, following Richard Tuck, I de-note as *De Indis*—Grotius was faced with the somewhat pedestrian task of authoring a juro-political pamphlet defending the questionable privateering activities of the Dutch East Indies Company, or the VOC. An extraordinary feat of rhetorical migration resulted from the multiple and prolonged re-draftings of this Text. The defence of the VOC came to serve as a template for a wider re-conceptualisation of the trans-national space within which the Company operated, now viewed in terms of the foundational premises of early Dutch republican political theory; it is my argument that *De Indis* serves as a direct continuation of Grotius' more wide-ranging republican project. The key manoeuvre, undertaken by Grotius in an almost *sub rosa* manner, was to render inter-state juridical 'space' discursively and rhetorically identical with intra-state juridical space. What underpinned this 'double discourse'

5 Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), ix.

migrating between the international and the municipal was Republicanism: the United Province's constitutional order as an exemplar of republican Corporatism provided the needed paradigm to discursively re-conceptualise trans-national space along the lines of what I call 'Corporate Sovereignty'. But what is most astonishing, and uniquely 'Grotian', within this radically diffuse process of discursive re-formulation is the manner in which the incorporated mercantile company was appropriated as a *sign* for a nascent early Modern World-System governed by a primitive international rule of law.

This notion of the VOC as a sign, the bearer of multiple and conflicting meanings both implicit and explicit, became an overriding factor in my work. It also made me consider in an original—and, I hope, convincing—way the relevance of New Stream Legal Scholarship and Deconstruction to the early history of International Law. At first glance World-System Analysis and Deconstruction would appear to be antimonies—the former stressing the primacy of structure and the dominance of the centre as against the latter's anarchic subversion of all totalising systems of meaning. In many ways, the relationship between the two recapitulates the latent tension between Structuralism and Post-Structuralism. Yet, as my own work progressed, I came to recognise overlapping areas of concern and compatibilities of approach. Not the least of these was a latent anti-essentialisation. The 'meaning' of every State is exhaustively constituted by its position vis-à-vis every other State within the entirety of the World-System, a mutually constitutive process of identity formation; this is directly analogous to Deconstruction's principle of *langue et parole*, in which the singular unit of meaning is determined solely by its position within complex chains of other signs and signifiers. The crucial link unifying the two approaches was provided by that nebulous entity Post-Colonialism. This template provides the basis for a transverse mode of critique of an international public order operating within the historical traces of European imperialism and Colonialism; in terms of World-System Analysis, the forcible transformation of the non-European regions into a global periphery and semi-periphery to the core zone of western Europe. This is the rationale for my work: to undertake an extended critical exegesis of Grotius' *De Indis* as a demonstration of the practical applicability of diverse methodological approaches to the critical legal scholarship of the genesis of modern International Law.

This book began as a thesis for the degree of Doctor of Juridical Science for the Law Faculty of the University of Melbourne, which I was awarded in December 2005. Thanks must be expressed to my two supervisors Professor Tim Lindsey and Professor Gillian Triggs. I have also gained tremendous benefits from discussions with external readers of my thesis manuscript: Professor Anthony Carty of the University of Aberdeen, Professor Hans W. Blom of Erasmus University in Rotterdam, Professor Peter Borschberg of The National University of Singapore, and Professor Richard Tuck of Harvard University. I also owe a collective thank you to the members of the Monash Law School Legal Philosophy Group—primarily Professor Jeff Goldsworthy, Doctor Dale Smith, and Doctor Patrick Emer-ton—who helped me make more precise my reasoning about contending ontologies 'thick' and 'thin'. A special 'thank you' also goes to the ever helpful library staff

of Monash Law School, in particular Ms. Michelle McConachie who repeatedly rose to the challenge of securing timely inter-library document delivery, a vital asset for the Australian legal academic undertaking the study of the history and philosophy of International Law at 'long distance' as it were. I must also thank my editorial assistant, Ms. Shing Khoo, who contributed enormously to the preparation of the manuscript for publication. The resultant creatures of darkness, or academic shortcomings, I acknowledge mine.

Eric Wilson
The House o'Blues

Introduction

On Heterogeneity and the Origin(s) of *De Indis* of Hugo Grotius

Naming is at once the Bible and what makes epistemology possible. How does one go about naming things? Naming consists in putting together common elements, things; but it quickly becomes clear that this amounts to no more than naming parts. When one limits oneself to naming parts one becomes lost in an infinite process and in reality names nothing. One decides nothing.

(Antonio Negri)

The production of a manuscript devoid of a Title¹ disrupts the ‘natural’ relationship that is ordinarily assumed to exist between Authorial ‘Presence’² and textual ‘Essence’—or transcendent Meaning.³ Such an occurrence is rich in deconstructive potential; the absence, or even the active ‘erasure,’ of the Title creates a space

- 1 In his pioneering study, Fruin divides the manuscript he names *De iure praedae* into three parts: the first part ‘the author himself entitled... *Dogmatica de iure praedae*’; the second part ‘bears the superscription *Historica*’; and the third part ‘begins with *Mare Liberum*.’ Robert Fruin, ‘An Unpublished Work of Hugo Grotius,’ *Bibliotheca Visseriana*, V (1925), 3–74 at 45.
- 2 ‘Presence’ is the invocation of the ‘Real’ and/or the ‘Originary’ that verifies the truth of either the spoken or written utterance. The ‘Author’ guarantees Presence/Origin/Truth through his or her hierarchical status as ‘author-ity,’ or *auctoritas*. ‘Immediacy is derived... all begins through the intermediary.’ Jacques Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976), 157. For Culler, ‘Presence is not originary but reconstituted.’ Jonathan Culler, *On Deconstruction: The Theory and Criticism of Structuralism* (London: Routledge & Kegan Paul, 1983), 106. See *ibid.* 100–9, 159–87 and 200–5.
- 3 Meant here not as the Platonic ‘other-worldly’ or ‘supra-sensible,’ but as the Derridean notion of a non-evident but logically necessary ‘sub-text’ that governs the production of meaning within the superficial or apparent Text. For the vital nexus between Modernity and its sub-set Law as co-bearers of ‘deific substitutes,’ see Peter Fitzpatrick, ‘“What are the Gods to Us Now?”: Secular Theology and the Modernity of Law,’ *Theoretical Inquiries in Law*, 8/1 (2007), 161–90, *passim*. Insofar as Law invokes the transcendental out of an ontological lack of its own, Law can never be self-grounding. ‘No matter how constrained, how seemingly settled a law may be, what remains somehow intrinsic to it is an always unsettling, restless appetency for what is illimitably beyond its existent realization.’ *Ibid.* 188.

of textual blankness within which the logic of iterability—or ‘rhetorical reversibility’⁴—is given free reign; in prosaic terms, the Reader is invested with unlimited scope to ‘guess’ what the Author’s intentions actually are (were), and, from the self-proclaimed determination to deductively infer the objective meaning (or ‘purpose,’ or ‘end’) of the Text. Hugo Grotius’ unpublished manuscript concerning the seizure of the Portuguese carrack *Santa Catarina*⁵—conventionally dated as being composed sometime between 1603 to 1608⁶—constitutes precisely such an event. The disassociation between Authorial Presence and Textual de-notation—‘Naming’—compels serious consideration of the practical relevance of the vital Derridean notions of heterogeneity, origin, the graft, the arche-trace, and hierarchy/*differance* to the historical recovery of early International Law.

Deconstruction is a thoroughly historically grounded process: ‘broaching a deconstruction depends upon on a historical hermeneutics that justifies its beginnings as “subject to a certain historical necessity.”’⁷ For Derrida

The *incision* of deconstruction, which is not a voluntary decision or an absolute beginning does not take place just anywhere, or in an absolute elsewhere. An incision, precisely, it can be made only according to lines of force and focus of rupture that are localizable in the discourse to be deconstructed. The *topical* and *technical* determination of the most necessary sites and operators—beginnings, holds, levers, etc—in a given situation depends upon historical analysis. This analysis is *made* in the general movement of the field, and is never exhausted by the conscious calculation of a ‘subject.’⁸

- 4 For iterability’s relationship with both ‘alteration’ and ‘replication,’ see Rodolphe Gasche, *The Tain of the Mirror: Derrida and the Philosophy of Reflection* (Cambridge: Harvard University Press, 1986), 212–17.
- 5 The historical background to the seizure of the *Santa Catarina* has been exhaustively detailed by Peter Borschberg, and will not be discussed here. See Peter Borschberg, ‘The *Santa Catarina* Incident of 1603: Dutch Freebooting, the Portuguese *Estado da India* and Intra-Asian Trade at the Dawn of the 17th Century,’ *Review of Culture*, 11 (2004), 13–25. See also, Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595–1615* (Leiden: Brill, 2006), Chapter One, 1–52.
- 6 The recent pioneering, albeit contentious, work by Borschberg and van Ittersum on the watermarks of the pages in the original manuscript provide evidence that Grotius may have been working on the Text as late as 1613. Peter Borschberg and Martina Julia van Ittersum, ‘Profit and Principle? Hugo Grotius, the VOC, and the Estado da India: the Historical Context of *De Jure Praedae*,’ conference paper, ‘Piracy, Property, and Punishment: Hugo Grotius and *De iure praedae*,’ Netherlands Institute for Advanced Study in the Humanities and Social Sciences, Conference June 9–11, 2005, Wassenaar.
- 7 Gasche, *The Tain of the Mirror*, 170; Derrida, *Of Grammatology*, 162.
- 8 Jacques, Derrida, *Positions* (Chicago: University of Chicago Press, 1971), 82. Presumably, ‘Subject’ is inter-exchangeable with ‘Author’.

Deconstructive praxis, therefore, is embedded within both the material and the temporal, continually re-invoking the conditions of historical particularity and contingency; 'Generally speaking, one could say that deconstruction starts within the texts to be deconstructed by focusing on tracts within conceptual structures, or on concepts within conceptual dyads that, for reasons to be historically determined, have been confined to a secondary role or put, so to speak, on reserve.'⁹

Employing Deconstruction, this book will critically investigate the 'problem' of the rival Names of the Grotian text: *De Iure Praedae*,¹⁰ which signifies a juridical essence that exhausts the meaning of the Text, and *De Indis*,¹¹ which signifies wider discursive fields of International Relations, global governance,¹² and Colonialism. The practical problem will be explaining the historical privileging of the 'Juridical' Title over the 'Political'. To avoid the charge of 'counter-essentialism',¹³ I do not argue that *De Indis* is an objectively superior de-notation of the Text;¹⁴ rather, I hold that the heterogeneous logic of Deconstruction legitimately empowers the reader to de-note the Text in *either* fashion. It is the inextricability of Deconstruction from heterogeneity that makes such an analysis possible; 'If words and concepts receive meaning only in sequence of differences, one can justify one's language, and one's choice of terms'¹⁵ only within a topic and an historical strategy. The justification can therefore never be absolute and definitive. It corresponds to a condition of forces and translates an historical calculation.'¹⁶ In other words: 'If a ground is to be a ground, it must be heterogeneous.'¹⁷

9 Gasche, *The Tain of the Mirror*, 171.

10 'On the Law of the Prize.'

11 'On the Indies', or, *in the alternative*, 'On the Indians'. The significance of this titular alterity will be discussed below, this Chapter.

12 Governance is inherently extra-governmental: 'Governments exercise rule, governance uses power.' Ernst-Otto Czempiel, 'Governance and Democratization,' in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), 250–71 at 250. Rosenau defines governance as the anti-hierarchical 'command mechanism of a social system and its actions that endeavour to provide security, property, coherence, order and continuity to the [social] system.' James N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997), 145. 'Global Governance' is discussed at greater length in Chapters One and Four, below.

13 As Culler has noted, 'Relying on distinctions that it puts in question... [Deconstruction] can always be attacked... as an accessory to the hierarchies it denounces.' Culler, *On Deconstruction*, 151.

14 Nor could this be possible in terms of Deconstruction; Heterogeneity 'comprises a multiplicity of very different and radically incommensurable layers, agencies, or sediments that invariably make up discursive wholes.' Gasche, *The Tain of the Mirror*, 132. See *Ibid.* 89–94 and 133–6.

15 Or 'Titles'!

16 Derrida, *Of Grammatology*, 70.

17 Gasche, *The Tain of the Mirror*, 89.

The ‘problem’ of Origin(s) is inseparable from heterogeneity:¹⁸ ‘at first there are sources, the source is other and plural.’¹⁹ For Deconstruction, the hermeneutical ‘cardinal sin’ is the reduction of ‘Meaning’²⁰ to a monistic ‘originary’,²¹ a ‘linear genesis’.²² Origin operates as the ‘space for inscription’, the unified—and unifying—ground²³ ‘for the constitution of the *subject*, and, so to speak, of *constitution* itself.’²⁴ Inscription, in turn, ‘is the name of the possibility that all speech must presuppose—that marks all speech—before it can be linked to incision, engraving, drawing, the letter—in short, to writing in the common sense of the term.’²⁵ The ‘problem’ of inscription/writing is heterogeneity;²⁶ all origins are marked by a ‘perpetual confounding’ which logically precludes unity, and, therefore, the ‘finality’ or self-determinative status of meaning.²⁷

The practical relevance of origin(s) to the de-notation of *De Indis* has been expressed perfectly, and without apparent irony, by Armitage.

Mare Liberum was substantially identical²⁸ to the twelfth chapter of *the work usually referred to by Grotius himself as De rebus Indicis*²⁹ (‘On the Affairs of the Indies’), *though*

18 ‘The pluralisation of the origin is a first step toward a deconstruction of the value of origin. This deconstruction begins with the recognition that the source or origin is characterized by a certain heterogeneity.’ Ibid.180.

19 Jacques Derrida, *Margins of Philosophy* (Brighton: The Harvester Press, 1986), 277.

20 Which is itself inherently pluralistic: ‘Meaning is the spin-off of a potentially endless play of signifiers, rather than a concept tied firmly to the tail of a particular signifier.’ Terry Eagleton, *Literary Theory: An Introduction* (Oxford: Basil Blackwell, 1983), 127.

21 See Derrida, *Of Grammatology*, 18–29.

22 Gasche, *The Tain of the Mirror*, 157.

23 Conventionally understood as ‘originary Oneness’, the ‘originary logical space’ of the ‘homogenous sphere of judgement.’ Ibid. 92. See also ibid. 89–95, 154–6 and 160–1.

24 Derrida, *Of Grammatology*, 281.

25 Gasche, *The Tain of the Mirror*, 157.

26 Derrida, *Positions*, 96.

27 Gasche, *The Tain of the Mirror*, 174–5.

28 For the implications of this ‘identity’, see below, this Chapter.

29 The Title is evocative of a ‘parallel’ Grotian Text, *De Rebus Belgicis*, a patriotic history of the Dutch War of National Liberation from 1588 onwards, written from between 1601 to 1612. If Grotius de-noted a Text centred upon the nationalist activities of Dutch Privateers as ‘Concerning the Low Countries’, it cannot be logically precluded that he would have de-noted a similarly themed Text concerning Dutch privateers operating in the Indian Ocean ‘Concerning the Indies’. See below, Chapter Seven.

better known by the title given it by its first editor,³⁰ *De Jure Praedae Commentarius* (Commentary on the Law of Prize and Booty).³¹

In a letter dated 1 November 1606 to George Lingelsheim, Grotius declared

The little treatise on Indian affairs is complete: but I do not know whether it should be published as written or only those parts which pertain to the universal law of war and booty. Many indeed have dealt with this subject that is both old and new. But I believe that new light can be thrown on the matter³² with a fixed order of teaching, the right proportion of divine and human law mixed together with the dictate of philosophy.³³

Note the logic of heterogeneity that the Author (self-) consciously draws to Lingelsheim's attention: there is a fissure within the Text between two contending discursive fields, but one of them (Just War, or *bellum iustum*) is subordinate via the de-notation of the other under the proper Title ('Indian Affairs'). Despite this, Fruin, in his 'originary myth'³⁴ names it *De Jure Praedae*, signifying the Text as a legal brief through his historical (mis-) identification of Grotius as an advocate of the Dutch East India Company (the *Vereenighe Oostindische Compagnie*, herein abbreviated as the VOC).³⁵ For Deconstruction, the question is: how is it that a

30 H.G. Hamaker, who merely repeated the entry provided by the catalogue auction of 1864: 'H. Grotii opus de jure praedae in XVI capita divisum, 280 pag.—Msc. Autographe inedit. Seulement une partie du chapitre XII a ete publie en 1606, sous le titre Mare Liberum.' Fruin, 'An Unpublished Work of Hugo Grotius', 3.

31 David Armitage, 'Introduction,' in Hugo Grotius, *The Free Sea*, ed. David Armitage (Indianapolis: Liberty Fund, 2004), xi-xx at xiii. Emphases added.

32 It is unclear from the context whether Grotius is referring to 'Indian affairs' or to 'the universal law of war and booty'. The sentence 'Many indeed have dealt with this subject that is both old and new' would, *prima facie*, indicate that the subject is *bellum iustum*, given that Just War occupied a central position in Classical and Medieval jurisprudence. However, when we recall that the 'Indian' was regularly identified with the 'Infidel' and/or the 'Barbarian', then the subject of Indigenous Peoples, or at least non-Christian peoples, can be shown to possess an equally respectable pedigree within Western legal literature. See Robert A. Williams, 'The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought,' *Southern California Law Review*, 57 (1983), 1–99, *passim*.

33 Cited in Martina Julie van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in *De Jure Praedae* (1604–1606),' *Asian Journal of the Social Sciences*, 31/3 (2003), 511–48 at 544–5. Emphases added.

34 Fruin, 'An Unpublished Work of Hugo Grotius', 25, 36 and 39.

35 Ibid. This same editorial manoeuvre was later replicated by the Carnegie Institute with its re-translation and publication of the Text as *De Jure Praedae Commentarius: Commentary on the Law of Prize and Booty*. Most legal academics have followed this practice. It has recently been re-issued in a new edition but with the same title: *Commentary on the Law of Prize and Booty*, edited with an Introduction by Martina Julie

‘mere’ editorial intervention has so thoroughly historically overridden authorial intent, or ‘Presence’?

On a purely literal reading, *De Iure Praedae* appears to be the ‘correct’ title;³⁶ discussions of the seizure permeate the Text, although ordinarily within strict textual contours of wider discussions of *bellum iustum*.³⁷ Equally important, prize taking occupied a central position within seventeenth-century Maritime Law,³⁸ and a large percentage of the work of Dutch Admiralty courts was devoted to the determination and division of lawful ‘booty’.³⁹ Employing a strict correspondence theory of Truth, the meaning of the Text is identical with, or ‘exhausted’ by, its historical occupation of ‘juridical space,’ both discursive and institutional. Yet Grotius never formally acted as an advocate of the VOC and never directly participated in the Court proceedings; as Author he never operated exhaustively within ‘juridical space’.⁴⁰ Herein lies the potential for Deconstruction: the search for heterogenous grounds of origin(s) ‘erases’ the Judicial as the unified—and *unifying*—‘ground’ of the Text.⁴¹ Heterogeneity subverts the determinative relationship between the Text and Law, allowing for the intervention of International Law’s long repressed ‘Other’⁴²—International Politics. A self-determinative chain of signifiers now stands revealed: *De Iure Praedae*, as Title, signifies Author-as-Lawyer which, in turn, embeds ‘Meaning’ exclusively within the contours of judicial discourse. Conversely, the de-notation ‘*De Indis*’ politicises the Text, signify-

van Ittersum (Indianapolis: Liberty Fund, 2006). The only major Grotius scholar to refer to the Text as *De Indis* is Richard Tuck; see below, this Chapter.

- 36 The Text ‘means to prove that the East India Company has a right to take booty from the Portuguese merchants in the Indies. The whole argument serves this purpose... Everything fits in; all the parts are dove-tailed and support each other mutually.’ Fruin, ‘An Unpublished Work of Hugo Grotius’, 56.
- 37 For example, the pivotal C. XIII: ‘Wherein it is shown that the War is Just, and that the Prize in Question was Justly acquired by the Company, in the Public Cause of the Fatherland.’ Hugo Grotius, [*De Indis*] *De Iure Praedae Commentarius. Commentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (London: Wildy & Sons, 1964), 283–317. On the self-subverting ‘reversible’ meaning of C. XIII, see below, this Introduction.
- 38 J.H.W. Verzijl, *International Law in Historical Perspective. Volume IV: Stateless Domain* (Leyden: A.W. Sijthoff, 1971), 6–119.
- 39 Cornelius Roelofsen, ‘Early Dutch Prize Law: Some Thoughts on a Case Before the Court of Holland and the Grand Council of Mechelen (1477–1482)’, *Netherlands International Law Review*, 27 (1980), 220–6, *passim*.
- 40 *De Indis* was never formally submitted as a legal brief. See C.G. Roelofsen, ‘Some Remarks on the “Sources” of the Grotian System of International Law’, *Netherlands International Law Review*, 30 (1983), 73–80, *passim*.
- 41 Fruin makes a revealing comment in this regard: ‘Occasionally [Grotius] seems to deviate from his path and dwell on matters which are not evidently connected with his real subject.’ Fruin, ‘An Unpublished Work of Hugo Grotius’, 56.
- 42 The ‘not-Self’ that defines, or ‘limits,’ the Self through alterity. See Gasche, *The Tain of the Mirror*, 100–5.

ing Grotius-as-Author of a self-conscious political treatise. It is no coincidence that it is Richard Tuck, whose work is premised upon Grotius as a major political theorist,⁴³ who is the one Grotius scholar to self-consciously employ the Title 'Concerning the Indies'.⁴⁴ Heterogeneity renders explicit what Tuck maintains as implicit: *De Indis* more closely resembles a political pamphlet than it does a legal brief. The 'Dutch Revolt' (1565–1609), which temporally overlaps with the composition of the Text, was History's first modern 'propaganda war'.⁴⁵

It is instructive to regard van Ittersum's compelling historical reconstruction of the preliminary composition of the Text within the terms of heterogenous Origin(s). Suspicious of hyper-textualist approaches, such as that she attributes to 'the Cambridge School', which she accuses of yielding a-historical readings,⁴⁶ van Ittersum resolutely places the originary genesis of the Text within the thoroughly material (ist) arena of Corporate identity and interest(s); 'Grotius' intentions in writing *De Jure Praedae* were intimately bound up with the legal, political and financial difficulties faced by the VOC directors as a consequence of adopting an aggressive military and naval strategy.⁴⁷ Yet, even van Ittersum is forced to admit to an elliptical movement on the part of the Author, the Text 'sliding', as it were, between and among competing sets of rhetorical and discursive stratagems.

Yet, it is doubtful that [*De Indis*] had originally been conceived as a work of legal scholarship. The Amsterdam VOC directors probably expected something very different from [Grotius] when they commissioned an *apologia* for Van Heemskerck's capture of the *Santa Catarina* in September 1604. If it had been up to them, the format of *De Jure Praedae* may well have been that of a historical narrative pure and simple—a short, pithy pamphlet, publishable at short notice, which detailed the horrors of the Portuguese mistreatment of Dutch merchants and their indigenous allies.⁴⁸

43 See Richard Tuck, *The Rights of War and Peace: Political Thought and International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999) at 232, where *De Indis* is expressly referred to as the locus of 'the first modern political theory'.

44 Grotius 'composed a treatise which he always referred to as *De Indis*, but which its nineteenth century editor christened *De iure praedae*.' Richard Tuck, *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press, 1993), 170. See *ibid.* 167–97, 185–8, 196, 197 and 276. See also, Tuck, *The Rights of War and Peace*, 79–94, 96–100, 102 and 103.

45 Kees Roelofsen, 'Historical Dimensions of Prize-Taking', conference paper, 'Piracy, Property, and Punishment: Hugo Grotius and *De iure praedae*', Netherlands Institute for Advanced Study in the Humanities and Social Sciences, Conference, June 9–11, 2005, Wassenaar.

46 Van Ittersum, *Profit and Principle*, xxxviii–xliv.

47 *Ibid.* 110.

48 *Ibid.* 108. As both van Ittersum and I show—albeit for different reasons and in different ways—this singular conflation of European and Indian identities rhetorically unified through multiple tactical (re-) deployments of Natural Law, constitutes one of the hallmarks of *De Indis*. See below, Chapter Eight.

Van Ittersum never permits Grotius-as-Author to leave the orbit of the VOC.⁴⁹ In her robustly anti-inter-textualist approach, ‘origin’, which is directly equated with both ‘purpose’ and ‘function’, effectively exhausts ‘meaning’. A deterministically linear reading yields a reductionist hermeneutics that van Ittersum finds difficult to sustain over time. This is the inevitable result of van Ittersum’s own highly commendable logic, which is to—even if only implicitly—‘de-construct’ the boundaries between Law and Politics (and Commerce). If *De Indis* is not a legal Text properly so-called but a political instrument in essence, then the *totality* of all contemporary political readings and significations are subject to the invocation of that Text; herein, we substitute the universality of inter-textuality for a parallel universality of political signs and signifiers.

There is a possibility, of course, that Grotius never had any intention of living up to the [VOC] director’s expectations.⁵⁰ Yet it is far more likely that his priorities changed in the process of writing *De Jure Praedae*. This would explain its strange, hybrid nature... Grotius was apparently so preoccupied with the VOC’s vicissitudes in domestic and international politics that it became increasingly difficult for him to write a straightforward ‘defence of the case’. In writing *De Jure Praedae*, he may well have found himself aiming at a moving target, certainly when he decided to address a variety of political, financial and legal problems faced by the fledgling Company in 1604–1606.⁵¹

I argue that it is precisely the ‘strange, hybrid nature’ of *De Indis* that most compels scholarly interest and should constitute the proper foreground of close critical reading. Van Ittersum clearly indicates as much and goes far in this direction; according to her, during the less than successful London Conference of 1615, Grotius himself gave a remarkably ‘expansive’ interpretation of the ‘purpose’ of *De Indis* in the face of hostile criticism of his English counterparts; the Text had been written ‘in order to expose the intellectual vacuity of the Iberian claims to universal monarchy, and to strengthen the VOC directors in their resolve to fight a war of liberation in the East Indies, not just for their own sake, but also for the

49 Grotius’ ‘theoretical concerns were always subject to the VOC’s political needs and commercial interests.’ Ibid. liv.

50 The full significance of this cryptic statement is left un-expounded. I take it to mean that even in 1604, Grotius-as-Author may have had ‘other things on his mind’ (that is, a differential intent) other than the political and fiscal perils of the recently constituted corporation. Compare this with Porras’s observation that *De Indis* was ‘a work whose significance went well beyond the dispute in question.’ Ileana M. Porras, ‘Constructing International Law in the East Indian Sea: Property, Sovereignty, Commerce and War in Higo Grotius’ *De Iure Praedae*—The Law of Prize and Booty, or “How to Distinguish Merchants from Pirates”, *Brooklyn Journal of International Law*, 31/3 (2006), 741–804 at 754. Porras’ more recent work offers independent verification of many of the points that I raise in this volume.

51 Van Ittersum, *Profit and Principle*, 108–9.

sake of the poor oppressed natives.⁵² This moment of Grotian auto-interpretation accords well with my own subjective reading of the Text. If we insert into (a) the notion of ‘hegemonic succession’ and (b) the phenomenon of ‘war of national liberation’/‘Iberian claims to universal monarchy’ both, we come directly to the core tenets of my own proffered interpretation, both constructs lying well beyond—but absolutely consistent with—the somewhat circumscribed horizons of the original ‘political, financial and legal problems faced by the fledgling company.’ If forced to adopt a more naive epistemology, I would argue that both (a) and (b) constitute the Author’s ‘true’ or ‘essential’ concern, with this central caveat: that both purposes are mediated by the rhetoric and discourse of early Dutch Republicanism. I very much understand *De Indis* to constitute a republican Text, albeit one that was not written as such in a wholly systematic or ‘self-conscious’ manner. Republicanism serves as the discursive framework through which both (a) and (b) are co-joined as mutual arenas of authorial interest and concern. Republicanism operates to best guarantee the successful realization of both objectives within the historical reality of the ‘event’ of Grotian *écriture*: the emergence of the Modern World-System that served as the ‘real world’ Text to Grotius’ discursive Text *De Indis*. I agree with van Ittersum that the VOC is the central discursive subject of the Grotian Text; however, I feel that the Author rhetorically appropriated and actively *re-formulated* the Company as the bearer, or ‘sign,’ of republican principles and values, even while engaged in the comparatively pedestrian task of explicating its ‘interests.’ The employment of Deconstruction allows us to detect the presence of a ‘double discourse’ within *De Indis*: the VOC is simultaneously a ‘corporation’ and a ‘republic.’ In my opinion, *De Indis* acts as a single component of Grotius’ wider and continuous project of experimentally developing early republican theory.

Van Ittersum clearly perceives the discursive and rhetorical complexity at work within the Text, although she opts not to take the ‘deconstructive turn.’ She situates the historical genesis of *De Indis* as a specific act of *écriture* in Grotius’ efforts to ‘disentangle’ the conflicting rhetoric employed by the Dutch Admiralty Board in adjudicating the prize: ‘The judges were content to jumble together natural law, *ius gentium*, and the concept of the just war, without clarifying what, if any, connections there might be between these legal principles on a theoretical and practical level.’⁵³ Whereas the VOC admiral van Heemskerck justified his privateering actions through private reliance upon *ius naturale*, the Admiralty legitimised the seizure in terms of lawful revenge, or reprisal;⁵⁴ ‘what had been revenge pure and simple in the resolution of [the privateers] became punishment for transgression of the natural law in *De Jure Praedae* [sic], meted out by private individuals exercising their natural rights.’⁵⁵ Shifting from his ‘originary’ discourse of Civic

52 Ibid. 410.

53 Van Ittersum, ‘Hugo Grotius in Context,’ 523.

54 Ibid. 524.

55 Ibid. 526.

Humanism, it was his reliance upon Late Scholasticism ‘that allowed Grotius to untangle the various arguments jumbled together in the verdict of the Amsterdam Admiralty Board.’⁵⁶ Accordingly, ‘*De Jure Praedae* can be regarded as Grotius’ attempt—a highly successful one—to disentangle the various strands of the law heaped together in the verdict of the Amsterdam Admiralty Board.’⁵⁷

After persuasively situating the composition of the ‘originary’ Text of *De Indis*—the apologetic *Historica*⁵⁸— between 1604–5, van Ittersum argues that ‘at some point’⁵⁹ Grotius decided⁶⁰ that ‘certain problems bound up with the law of war’ had been ‘hitherto exceedingly confused’ and demanded ‘explanation and solution.’⁶¹ Yet we may wonder how van Ittersum is able to attribute such a universalising impulse to Grotius if his authorial intent was the wholly linear one of disentangling the ‘jumbling’ evidenced by the Dutch Admiralty Board during the legal proceedings of 1603–4.⁶² By identifying the Origin(s) of the Text with juridical space/discourse, van Ittersum implicitly polarizes the inherently dynamic rhetorical interplay of the primary discourses utilized: Civic Humanism and Late Scholasticism. Both are variants of Natural Law, *De Indis* perpetually oscillating between the two positions, or ‘antinomies.’⁶³ Ontologically, the Humanist variant of *ius naturale* is relatively ‘thin,’ inductively grounded upon *habitus*, generalised patterns of social conduct;⁶⁴ Scholasticism is relatively ‘thick,’ deductively inferred from Providence, or *lex aeterna*.⁶⁵

Her use of the word ‘dis-entangling’ is highly suggestive,⁶⁶ signifying an authorial intent to super-impose a (self-) determinative order upon a series of incom-

56 Ibid. 525.

57 Ibid. 524.

58 See below for discussion regarding the ‘graft’.

59 Undetermined by van Ittersum.

60 Van Ittersum does not provide Grotius’ reasons.

61 Ibid. 525.

62 The *Santa Catarina* was condemned as ‘a good and just’ Prize by the Dutch Admiralty Court on 9 September, 1604. Verzijl, *Stateless Domain*, 10.

63 See below, Chapter Two.

64 Anthony Pagden, ‘The Preservation of Order: The School of Salamanca and the ‘Ius Naturae’, in F.W. Hodcroft, et al. (eds), *Medieval and Renaissance Studies on Spain and Portugal in Honour of P.E. Russell* (Oxford: The Society for the Study of Medieval Language and Literature, 1981), 155–66 at 159; Jeanine Quillet, ‘Community, Counsel and Representation’, in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c. 350–1450* (Cambridge: Cambridge University Press, 1988), 520–72 at 528–31.

65 Pagden, ‘The Preservation of Order’, 159. See B.P. Vermeulen and G.A. van der Wal, ‘Grotius, Aquinas and Hobbes: Grotian Natural Law Between *Lex Aeterna* and Natural Rights’, *Grotiana*, n.s., 16–17 (1995–96), 58–84, *passim*.

66 It is, in fact, uncannily evocative of Nietzsche’s (in)famous discussion of the multi-layered ‘genealogy’ of morality, or punishment, which for Nietzsche was one and the same thing:

mensurable discourses, whose inherent heterogeneity signifies the absence of an otherwise 'unifying' Presence. Van Ittersum's account, therefore, should be critically juxtaposed to the following passage from C.I of *De Indis*.

[O]ur undertaking requires a combination of all the various forms of discourse customarily deployed by orators.⁶⁷ It calls for debate as to whether the aforesaid act⁶⁸ was right or wrong, *to be conducted as if the point were being argued in court*, but also for the assumption of the censor's function of praise and blame; and furthermore, *since the circumstances which gave rise to the act remain unchanged*,⁶⁹ advice must be given as to whether or not the course of action already adopted is expedient for the future.⁷⁰

This passage serves two purposes. Firstly, the self-consciously ironical invocation of 'the Court' as metaphor subverts the originary 'essentialization' of the juridical text, as signified by the 'legal-esque' Title *De Iure Praedae*. Secondly, the explicit utilization of historically localizable inter-state relations signifies an authorial intent to operate within an extra-judicial domain of discursive formation, involving explicit considerations of global governance. The heterogenous grounds of *De Indis* create a positive field for the 'free play' of signifiers, rather than revealing the negative absence of a sought-for 'linear genesis'. As Tanaka has noted, 'there is a tension between a systematic approach and the extensive citation of discursive authorities, and [Grotius] often sacrifices the former.'⁷¹ Rather

The concept 'punishment' possesses in fact not *one* meaning but a whole synthesis of 'meanings': the previous history of punishment in general, the history of its employment for the most various purposes, finally crystallizes into a kind of unity that is hard to disentangle, hard to analyse and, as must be emphasized, especially, totally *indefinable*. (Today it is impossible to say for certain *why* people are really punished: all concepts in which an entire process is semiotically concentrated elude definition; only that which has no history is definable.)

Friedrich Nietzsche, *On the Genealogy of Morals and Ecce Homo*, ed. with Commentary, Walter Kauffman (New York: Vintage Books, 1969), 80.

67 Which raises the truly disturbing possibility of the *utter impossibility* of assigning the Author *any* self-conscious meaning. The passage also implicitly invokes the identification of Humanism with Rhetoric. 'Above all, [civic life] was done through dialogue, so that rational conclusions might emerge. It made for a dynamic relationship, open-ended and uncertain in its conclusions.' H.G. Koenigsberger, 'Republicanism, Monarchism and Liberty', in Robert Oresko, et al. (eds), *Royal and Republican Sovereignty in Early Modern Europe* (Cambridge: Cambridge University Press, 1997), 43–74 at 44. On the notion of Civic Humanism as Rhetoric, see below, Chapter Five.

68 The seizure of the *Santa Catarina* by the VOC on 25 February 1603 in the Straits of Malacca.

69 That is, the hegemonic inter-state rivalry between Portugal and the United Provinces. See below, Chapter Three.

70 Grotius, *De Indis*, 5. Emphases added.

71 Tadashi Tanaka, 'Grotius' Method: With Special Reference to Prolegomena', in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo*

than ‘disentangling the jumble,’ *De Indis* actively re-iterates discursive pluralism, now invested with authorial self-consciousness, precluding both the unity of Meaning and the unifying effects of historical reconstruction. This is perfect heterogeneity, *authorial presence as nothing other than this perpetual rhetorical migration*; for Derrida, ‘There is more than one kind of writing: the different forms and genres are irreducible.’⁷² As Gasche comments, ‘By nature there can be no such thing as mono-writing; writing is plural by essence. To suspect writing of “monism” is sheer absurdity; the different forms and genres of writing call for rigorous distinction.’⁷³ By a happy historical coincidence, the primary maxim of capital-intensive republican Holland was none other than: ‘Forbid as little as possible, accept inputs from everywhere.’⁷⁴ The ‘anti-originary’ reading of *De Indis* signifies an inherently capitalist logic of inter-textual appropriation; the fluidity of production/exchange receives its concomitant discursive expression through an indeterminable heterogeneity.

Derrida’s central notion of the ‘graft’ subverts any unified Meaning that Origin would super-impose upon the Text.⁷⁵ The graft is the ‘primary-unit-of-analysis’ of Deconstruction,⁷⁶ constitutive of its ‘attempt to classify various ways of inserting one discourse in another, or intervening in the discourse one is interpreting.’⁷⁷ Discourses are sutured together through writing/inscription: ‘folded into a new

Grotius (Oxford: Clarendon Press, 1993), 1–31 at 25.

72 Jacques Derrida, *Dissemination* (Chicago: The University of Chicago Press, 1981), 242.

73 Gasche, *The Tain of the Mirror*, 277. See Ibid. 135:

The analysis presupposed by all deconstruction...consists of...an assessment of the various heterogeneous levels of philosophical discourse, as well as the heterogeneous elements or agencies that combine on these levels...What is at stake is the assessment of the generality and irreducibility of these various inequalities...Deconstruction is thus the attempt to account for the heterogeneity constitutive of philosophical discourse, not by trying to overcome its inner differences but by maintaining them.

It is seductive to substitute ‘Admiralty courts’ for ‘agencies’ here, re-iterating the heterogeneity of *both* deconstructive critique and historical subjectivity.

74 Immanuel Wallerstein, *The Modern World-System II: Mercantilism and the Consolidation of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1980), 67.

75 ‘The heterogeneity of different writings is writing itself, the graft. It is numerous from the first or it is *not*.’ Derrida, *Dissemination*, 356; see *ibid.* 355–8. Gasche has equated the graft with ‘discursive inequalities or dissimilarities, which are due to these conflicting strata within the coherence of texts or works.’ Gasche, *The Tain of the Mirror*, 131.

76 Culler defines Deconstruction as ‘an attempt to identify grafts in the text it analyses: what are the points of juncture and stress where one scion or line of argument has been spliced with another... Focusing on these moments, deconstruction elucidates the heterogeneity of the Text.’ Culler, *On Deconstruction*, 135. See Ibid. 135–56, 202–5, 270–2.

77 Ibid. 135.

system, the long sequences are displaced; their sense and function change.⁷⁸ For Deconstruction, the 'motif of homogeneity, the theological motif par excellence, is what must be destroyed.'⁷⁹ As Tuck has remarked

At first glance, the *De Indis* (as I shall call it, in deference to its author's wishes) is a surprising work to come from the pen of a young humanist. It deploys a very wide range of sources and types of argument, ranging from the familiar texts of antiquity to modern Hispanic scholastics, and from historical analogy to a much more rigorous and scientific style of exposition. In fact, the scholastic sources are not particularly prominent in the body of the work; they appear mainly in a set of footnotes added later. The *De Indis* began as a relatively short and clear humanist essay to which Grotius characteristically added more and more copious citations and quotations from both antiquity and modernity (exactly the same technique that he was to use in the *De iure belli ac pacis*, each new edition of which added a great deal of exemplifying material).⁸⁰

However, what Tuck omits is any consideration as to: (i) *why* Grotius 'inflated' the Text, and (ii) *why* the resultant 'inflation' assumed the form of a rhetorical movement towards Scholastic authority. The simple answer may be that, like so many other philosophical writers before him and since, he realized that he required a strong Metaphysics to validate his system of Ethics, in his case, one to be observed and enforced upon the extra-prescriptive High Seas/*mare liberum*. The act(s) of writing(s) itself constituted the discursive arc linking Humanism with Scholasticism, an incremental substitution of a descending/deductive rhetoric for an ascending/inductive one. Like Tuck, van Ittersum also implicitly points to the 'fissured' nature of the Text: 'It cannot be emphasised enough that the manuscript's *dogmatica de jure praedae* were written last, *not* first. The evidence is admittedly circumstantial, but nevertheless compelling.'⁸¹ However, her empirically derived 'circumstantial' proof can be just as easily inferred deductively through a purely literary analysis of the internal rhetorical stratagems of the Text that logically mandate a discursive migration between the antinomies of ascending/descending modes of argumentation.

The multiple historical grounds of emergence complement perfectly the heterogeneous logic of the Text; the discursive object of the VOC as lawful transnational actor is textually situated within wider, and self-consciously political, considerations of inter-state relations.⁸² *De Indis* may legitimately be read as the juro-textual correlative to an early, or 'primitive', form of global governance. It is

78 Derrida, cited in *ibid.* 135.

79 Derrida, *Positions*, 64.

80 Tuck, *Philosophy and Government 1572-1651*, 154-5.

81 Van Ittersum, 'Hugo Grotius in Context', 525

82 'The main "source" of the Grotian system is to be found in the author's experience of international relations and his extensive knowledge of contemporary disciplinary history.' Roelofsen, 'Some Remarks on the "Sources" of the Grotian System of International Law', 79.

precisely this ‘Modern World-System’—a heterogenous interstate system giving political expression to an integrated global capitalist economy⁸³—that provided the necessary historical context for the composition of a self-serving political instrument for the VOC. As *De Indis*, the Text is governed by two signature rhetorical stratagems: (i) the attribution of an international normative/holistic order to international politics, derived from the alternating variants of *ius naturale*, and (ii) the replication of the heterogenous political logic of both the Modern World-System and the Capitalist World-Economy—the trans-border economic ‘composite of strikingly different trends of the component sectors’⁸⁴—as the juridical foundation of seventeenth-century international public order. Simply put, the Text ‘translates’ the operational requirements of the World-Economy into the terms of Naturalist jurisprudence. Positioned within the Modern World-System, *De Indis* signifies the United Provinces as hegemon;⁸⁵ as hegemon, the (con-) federated Netherlands⁸⁶ acts as the sign of the heterogenous Modern World-System. Herein, the Dutch Admiralty courts, the allegedly originary ‘site of production’ of *De Indis*, were merely subsidiary appendages within an emergent, albeit primitive, form of international public order.

Critical engagement with the Text compels a fundamental re-appreciation of the ‘Grotian Heritage’ within the historical development of Public International Law and International Relations. The substantive content of *De Indis* is predicated upon two sets of reversible/iterable conceptual dyads. These are: (i) investing ‘private’ Trading Companies with ‘public’ international legal personality, and (ii) effectively collapsing the distinction between ‘private’ and ‘public’ warfare. In 1601 Grotius was appointed Historiographer of Holland; in other words, he was historically situated as the self-conscious producer of republican and patriotic texts. Whatever the nature of his relationship with the VOC, the Author was clearly within the immediate political orbit of Holland’s Advocate (*lands-advocaat*), Johan van Oldenbarnevelt.⁸⁷ This would strongly indicate that Grotius’

83 Immanuel Wallerstein, ‘Inter-State Structure of the Modern-World System’, in Steve Smith, et al., *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), 87–107 at 89. See below, Chapters Two and Three.

84 Wallerstein, *The Modern World-System II*, 37. See Wallerstein, ‘Inter-State Structure of the Modern World-System’, 87–8, where the World-Economy is described as a global social system derived from ‘extensive commodity chains of production that cross multiple political boundaries’—the logic of heterogeneity embedded within historically material phenomena.

85 Wallerstein, *The Modern World-System II*, Chapter Two, 36–71; Peter J. Taylor, ‘Ten Years That Shook the World? The United Provinces as First Hegemonic State’, *Sociological Perspectives*, 37/1 (1994), 25–46, *passim*.

86 See below, Chapter Five.

87 The chief administrator, or ‘clerk’, of the Province of Holland, whose subjective political power was largely extra-constitutional, comprising a form of *governance*. As Sir Thomas Rodley put it, ‘all here [in the Netherlands] is directed by Holland and Holland is carried away by Barnevelt.’ Geoffrey Parker, *The Dutch Revolt*, rev. edn (London: Penguin Books, 1985), 248. Evidence of van Oldenbarnevelt’s continuous

textual ‘production’ would have operated within the parameters of an emergent political discourse; in deconstructionist terms, *De Indis* was situated within the discursive parameters, or arche-trace, of Republicanism.⁸⁸

The central hypothesis of this book is that *De Indis*, by virtue of its historically situated occupation of a highly specific juro-political landscape, operates within the parameters of a dual or ‘double’ trace: in temporal terms the early Modern World-System; in discursive terms, early Dutch Republicanism. My approach is both non-teleological and non-functionalist. Both hermeneutical hazards are avoided by stressing the necessary discursive connections operating between the primitive governance features of a nascent World-System and the rhetorical stratagems of Republicanism. Constituting far more than a mere apology for the privateering actions of the VOC, *De Indis* can be precisely situated within an historically distinct phase of the Grotian corpus conventionally known as the ‘juvenalia.’ The juvenile works of Grotius—which include such Texts as *De Republica emendanda* (c. 1600), *De Rebus Belgicis* (1601–12), the *Commentarius in Theses XI* (1603–8), *Mare Liberum* (1609), and the *Antiquitate Republicae Batavicae* (c.1610)⁸⁹—constitute a singular and unified discursive formation premised upon the twin political imperatives of early Dutch Sovereignty and Republicanism. The composition of *De Indis* from 1603 to 1608—or, possibly, as late as 1613⁹⁰—transverses the entirety of Grotius’ republican phase as an apologist and propagandist for the newly emergent Dutch Republic, a trajectory which was only disrupted by his imprisonment and subsequent conversion to the constitutional monarchism of the Orangist cause. On a deeper, and more interesting, structural level a vital nexus is revealed between Republicanism and the emergence of an international public order governed by a Euro-centric and Universalist variant of the rule of law. In terms of Braudel’s *histoire conjuncturelle*,⁹¹ Republicanism serves as the natural juro-discursive expression of an embryonic World-System based upon an early Mercantile-Capitalist World-Economy that constituted a global system of primitive accumulation. It is this very precise historical correlation between

patronage is demonstrated by Grotius’ meteoric rise within the Dutch Republic: Solicitor General of the Province of Holland, 1607–13; Pensionary of Rotterdam, 1613–18; Member of the Estates of Holland and Member of the Dutch Estates-General, 1617. Not for nothing did Oldenbarnevelt refer to the Author as ‘my Grotius.’ Jan den Tex, *Oldenbarnevelt*, 2 vols, ii (Cambridge: Cambridge University Press, 1973), 683.

88 See below, Chapter One.

89 In this monograph I omit all discussion of Grotius’ manifold theological and ecclesiological treatises other than in a wholly summary manner. One of my purposes, admittedly a somewhat pedestrian one, is to contest the notion widespread in legal academic circles that Grotius was a purely secular thinker. Therefore, I have subversively fixated upon the allegedly ‘secular’ political and juridical Texts and subjected them to deconstructive praxis, ‘un-veiling’ the lurking presence of a panoply of theological and ontological premises.

90 See above, fn. 6.

91 See below, Chapter Two.

globalised primitive accumulation and Holland as the first ‘true’ hegemon that rendered the Dutch Republic as a singularly brutal, or ‘savage,’ international actor. As I will show, the cardinal republican tenet of Divisible Sovereignty invokes the heterogeneous axial core-periphery division of labour, which is the primary signifier of the Modern World-System.⁹² I also argue that the temporal, or secular, operations of the early Capitalist World-Economy and the foundational constitutionalism of Dutch Republicanism perpetually invoke and signify the presence of the other, both serving as the constitutive traces of *De Indis*, the textual site of a uniquely Grotian mode of double discourse. And it is precisely because there is a double discourse intertwined throughout *De Indis*—republican constitutionalism on the one hand, international public order on the other—that the Author was unable to finally leave his Text but, instead, eternally returned to it.

My argument forces a reconsideration of the problem of the self-subverting de-notation. On one level, both ‘Concerning the Indies’ and ‘On the Law of Prize and Booty’ may serve as iterable or reversible titles precisely because both denotations are discursively linked through Republicanism as a signifier of an early form of international legal order. Once this is understood, rhetorical inversion is achieved and the notation of the Text becomes an issue of ‘play.’ On another level, a more ominous transposition takes place. As I hope to prove, substituting *De Indis* for *De Iure Praedae*, which signifies the discursive shift of the Text from the judicial to the extra-judicial, tremendously widens the scope for the practical application of Critical Theory and Post-Colonialism to the early history of International Law: the Text may now be readily perceived as being suffused by the ‘Presence’ of Colonialism. *De Indis* may be legitimately classified as a ‘proto-colonialist text’ in at least two senses: (i) the discursive, the Text implicitly resting upon the supplement of the expropriating logic of other more explicitly colonialist texts such as Vitoria’s *De Indis* (1537–38); (ii) the historical, the Text positioned within the contours of the equally heterogeneous logic of the early Modern World-System. The strategic but hierarchically organized rhetorical linkages between Natural Law (*ius naturale*), the Free Seas (*mare liberum*) and the Just War (*bellum iustum*) establish the contours of the textual re-representation of the preliminary stage of the World-System of the ‘long’ 16th century.⁹³ The re-formulation of maritime *imperium* and *dominium* through the mediating device of *mare liberum* permits the untrammelled operation of *ius naturale* as the foundational principle of *bellum iustum*, signified by the seizure of the ‘Prize’ within juridically ‘free’—or ‘empty’—oceanic spaces (*res extra commercium*), ultimately resolving not only the explicit problem ‘Concerning the Indies’ but the implicit problem ‘Concerning the Indians’ as well.

92 Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Durham: Duke University Press, 2004), 20.

93 See below, Chapter Three.

Chapter One

The Genealogy of Grotian Morals: The Grotian Heritage, Natural Law, and Hegemony

It is not the least of the ironies of the history of western jurisprudence that one of the seminal texts of International Public Law, Grotius' *De Indis*, should be a legal defence of Privateering. Yet, it is one of the most revealing of ironies as well, pointing to the juridical legitimation of state-sponsored organized violence as the normative—and *normalizing*—keystone of international relations.¹ A primary example of what Critical Legal Studies (CLS) scholar David Kennedy has identified as 'Primitive Legal Scholarship',² *De Indis/Concerning the Indies/Concerning the Indians* acts as the juro-textual correlative to an early, or 'primitive', form of global governance. This 'Modern World-System'—a heterogenous interstate system giving political expression to an integrated global capitalist economy³—provided the necessary historical context for the composition of what appears at first glance appears to be an expedient legal brief for the Dutch East Indies Company/VOC. The Text's discursive continuity with Primitive Legal Scholarship is evidenced by two signature characteristics: the attribution of an international normative/holistic order to international politics, as derived from Natural Law, and the replication of the political logic of both the Modern World-System and the Capitalist World-Economy—a global social system based upon 'extensive commodity

1 Ellen Meiksins Wood, 'Infinite War', *Historical Materialism*, 10/1 (2002), 7–27 at 16:

The notion of some kind of international society bound together by certain common rules is regarded as one of Grotius' major contributions to international law and a peaceful world order. But his argument had far less to do with what individuals or states owe one another than the right they have to punish each other in pursuit of self-interest, not only in defending themselves against attack but 'proactively', as it were, in purely commercial rivalries.

I will demonstrate that Wood's analysis is essentially correct. For an extended treatment on the Grotian development of *ius bellum* as the normative foundation of interstate relations see below, Chapters Six and Seven.

2 David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27/1 (1986), 1–98, *passim*.

3 Immanuel Wallerstein, 'The Inter-State Structure of the Modern-World System', in Steve Smith, Ken Booth and Marysia Zalewski (eds.), *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), 87–109 at 89.

chains of production that cross multiple political boundaries'⁴—as the juridical foundation of 17th century international public order. *De Indis* systematically formulates the 'metalanguage' of early International Law as both textualism and as a material historicism. Simply put, the Text 'translates' the operational requirements of the World-System (praxis) into the terms of Naturalist jurisprudence (theory). A central tenet of this book is that an extended critical exegesis of *De Indis* will uncover hitherto unrecognised similitudes between early modern and contemporary International Law.

I The Genealogy of the Grotian Heritage

This paradoxical effect, produced by the co-mingling of superficially antithetical tropes of transparent international legal order and anarchic statist violence, is magnified when one recalls that both legal language (or 'discourse') and praxis have, historically, repudiated the very conditions upon which *De Indis* is expressly predicated: organized violence and state-sponsored criminality as the basis of legitimate international transaction. It appears as though International Law, in order for it to speak as itself, as required by legal education,⁵ re-presents itself in a camouflaged or disguised form, suffering from the externalised neurotic systems of repression, conflict, and selective amnesia: 'legal interpretation takes place in a field of pain and death';⁶ that is, state violence.⁷ Derrida has made this point explicitly, postulating violence as the visceral foundation of legal order.

There is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative... Since the

4 Ibid. 87–8.

5 See David Kennedy, 'International Legal Education,' *Harvard International Law Journal*, 26/2 (1985), 361–84, *passim*.

6 Robert M. Coover, 'Violence and the End of the World,' *Yale Law Journal*, 95 (1985–6), 1601–29 at 1601; David Kennedy, *International Legal Structures* (Baden-Baden: Nomos Verlagsgesellschaft, 1987), 246–7: 'Violence seems irrational and meaningless—it disrupts rational discourse and destroys the meaningful contexts of human life. Violence, like the terrorist's terror, lies outside international civilization...[yet] it seems difficult to locate violence *outside* the legal order...the Law seems preoccupied with that which purports to be external to it.' See *ibid.* 245–86.

7 In his Post-Colonial critique of International Law, Anghie also utilises the imaginary of Psychoanalysis, re-conceptualising contemporary international jurisprudence in terms of amnesia. 'The colonial history of international law is concealed even when it is reproduced... Indeed, international law remains oblivious to its imperial structures even when continuing to reproduce them, which is why the traditional history of international law regards imperialism as a thing of the past.' Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 268 and 312; see also 313–14.

origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground.⁸

At the risk of cliché, the unrelenting 'repeat and renewal'⁹ of the doctrine of Self-Defence and lawful Retorsion as the juridical correlatives of the generic 'War on Terrorism' constitutes a form of the 'return of the repressed'. Our language here is deliberately Freudian, underlining the close parallels between Deconstruction and Psychoanalysis. Broadly speaking, the 'return of the repressed' is that singular moment at which the imminent eruption into consciousness of that which has been denied is revealed as having exerted the controlling influence upon conscious awareness all along. It is at that very moment that the 'Self' realizes that he is identical with his own 'Other'.

The question [is] why critical scholars writing about international law are drawn to themes of violence and the outsider. One obvious response would be that we are simply pursuing the trajectory first traced out by Freud of examining that which is suppressed. One commonly asserted justificatory purpose of international law is the control or suppression of violence, religious passion, the irrational and the exotic/erotic. But imperfectly suppressed, these are constantly threatening to re-enter (and extinguish) the realm of international law. From this perspective, international law might be understood to be engaged in a perpetual struggle for predominance, only just managing to hold at bay its desiring (and desired) exiles. To focus on violence and the outsider is thus a critical strategy that places international law on the couch, in the hopes of healing it by making it acknowledge and come to terms with its violent and passionate fantasies.¹⁰

- 8 Jacques Derrida, 'Force of Law: The 'Mystical Foundations of Authority'', in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), 3-67 at 6 and 14.
- 9 David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Quinnipac Law Review*, 17 (1997), 99-138, *passim*. See also id. 'The Disciplines of International Law and Policy', *Leiden Journal of International Law*, 12 (1999), 9-133, *passim*; Id. 'A Rotation in Contemporary Legal Scholarship', in Christian Joerges and David M. Trubek (eds), *Critical Legal Thought: An American-German Debate*, (Baden-Baden: Nomos Verlagsgesellschaft, 1989), 353-96, *passim*; Id. 'When Renewal Repeats: Thinking Against the Box', *New York University Journal of International Law and Politics*, 32 (1999-2000), 335-500, *passim*; Id. 'A New World Order: Yesterday, Today, and Tomorrow', *Transnational Law & Contemporary Problems*, 4 (1994), 329-75, *passim*.
- 10 Ileana Porras, 'On Terrorism: Reflections on Violence and the Outlaw', in Dan Danieles and Karen Engle (eds), *After Identity: A Reader in Law and Culture* (New York: Routledge, Kegan & Paul, 1995), 295-313 at 295. For practical examples, See Michael Byers, 'Terrorism, the Use of Force, and International Law after 11 September', *International and Comparative Law Quarterly*, 51 (2002), 401-14, *passim*, and Nico Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council', *Max Planck United Nations Yearbook*, 3 (1999), 59-103, *passim*. Anghie fol-

The operational centrality of violent unilateralism within international relations continues to belie the notion of truly progressive international jurisprudence.¹¹ As Klein reminds us,

History shows that it is very much more efficient in the long run for States to 'apply power within the framework of an institution or legal system,'¹² rather than to resort to raw military force or economic coercion. The most obvious reason for this is that turning a relationship between two or more entities of unequal power which is—*ex hypothesi*—initially based upon sheer material power into a relationship which enjoys the recognition and protection of the law inevitably legitimises the factual domination exerted by the more powerful State over the other(s).¹³ This transformation entitles the former to resort to the means put at its disposal by the international legal system in order to enforce the—now legal—obligations owed to it by the later, within the 'neutral' framework of international law. *The very notions of 'force' or 'power' are thereby obliterated to a large extent.*¹⁴

lows a similar line of thought though his, like mine, is embedded within Post-Colonial discourse.

International law is in a permanent state of emergency; it could not be otherwise over the centuries, given that international law has endlessly reached out towards universality, expanding, confronting, including and suppressing the different societies and peoples it encountered... International law can maintain its coherence and play its classic role of regulating state behaviour only by carefully defining the cultural sphere, the civilized world, in which it operates. Thus the colony, the primitive, is always and everywhere within sovereignty doctrine, if only because it must be excluded and managed.

Anghie, *Imperialism, Sovereignty and the Making of International Law*, 314. All that we need do to complete the thought is to replace 'the primitive' with 'the repressed'.

- 11 See Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council', 102–3, on Anglo-American unilateralism:

Non-compliance can, for the most part, be explained by the hegemonic pursuit of objectives of the acting states. The limited role of international law in international security, is once again confirmed... western states do not accept the authority of the Security Council, but they pursue hegemonic objectives under the pretext of United Nations authority. Strong efforts to co-operate within the Council in the future are therefore unlikely, while unilateral definition of common interests will spread.

- 12 Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), 6.

- 13 David Kennedy, *International Legal Structures*, 248:

War, violence, even terror—their exclusion seems law's continuing imperative...when international legal scholars think of law struggling *against* war or violence, they acknowledge the motivational dimension of violence or war—indeed, it seems the origin of their loyalty to law itself. But they usually think of law as able to displace its motive, to become the *successor* to violence. It is in this sense that the displacement of force is thought to enable the law of peace.

- 14 Pierre Klein, 'The Effects of US Predominance on the Elaboration of Treaty Regimes and on the Evolution of the Law of Treaties', in Michael Byers and Georg Nolte (eds),

A possible therapeutic ‘cure’ might lie with a critical re-examination of that corpus of inter-referential texts collectively known as the ‘Grotian Heritage’, universally accepted as the foundational—or ‘primal’—event within the history of International Law. Pinto has expounded the central Grotian precepts as:

(1) The subjection of all States alike to rules of law, which are the product of an interaction between the Law of Nature, conceived as an inexhaustible resource of moral and equitable principles derived from the application of right reason; and the Law of Nations, conceived as derived from the free will of States; (2) the sovereign equality of States, based on the equality of all human beings, and the prohibition of the subjugation and exploitation of one State by another; and (3) the inter-dependence of all the States of the world community in economic and security matters. All these elements are related ultimately to the social nature or intrinsic ‘sociability’ of man.¹⁵

The General Law of Nations, or *iure gentium*, is, in turn, merely a practical extrapolation of the foundational principles of the Law of the Sea to the terra firma domain of state-centric International Relations.

(1) The regime of the open sea (or high seas) is to be distinguished from the regime of areas under coastal state jurisdiction; (2) the nature of the regime of areas under coastal State jurisdiction; and (3) the regime of the open sea (or high seas) concerning: (i) common use, (ii) prohibition of appropriation, (iii) freedom of navigation and non-interfer-

United States Hegemony and the Foundations of International Law (Cambridge: Cambridge University Press, 2003), 363–91 at 363. Emphasis added. See Edward Halliwell Carr, *The Twenty Year's Crisis 1919–1939: An Introduction to the Study of International Relations* (London: Macmillan, 1954), 86:

Just as pleas for ‘national unity’ in domestic politics always come from a dominant group which can use this solidarity to strengthen its control over the nation as a whole, so pleas for international solidarity and world union come from those dominant nations which may hope to exercise control over a unified world... ‘International order’ and ‘international solidarity’ will always be slogans of those who feel strong enough to impose them on others.

- 15 M. C. W. Pinto, ‘The New Law of the Sea and the Grotian Heritage’, in T.M.C. Asser Institut (ed.), *International Law and the Grotian Heritage* (The Hague: T.M.C. Asser Institut, 1985), 54–93 at 91. An alternative list is provided by Hersch Lauterpacht, ‘The Grotian Tradition in International Law’, in Elihu Lauterpacht (ed.), *The Law of Peace* (vol. ii of *International Law: Being the Collected Papers of Hersch Lauterpacht*) (Cambridge: Cambridge University Press, 1975), 307–65 at 327–65:

The subjection of the totality of international relations to the rule of law; the acceptance of the Law of Nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of States and Individuals; the rejection of ‘reason of State’ [i.e., anti-Machiavellianism]; the distinction between just and unjust wars; the doctrine of qualified neutrality; the binding force of promises; the fundamental rights and freedoms of the individual; the idea of peace; and the tradition of idealism and progress.

ence with lawful activities, (iv) conservation of the sea and its resources, and (v) breach of an explicit prohibition will entail liability to sanctions.¹⁶

The Grotian Heritage has also been appropriated by a number of international legal scholars, such as Weeramantry¹⁷ and Falk,¹⁸ who attempt to situate it within the parameters of the larger project of 'Humane Governance',¹⁹ Grotius acting as a 'free-floating' signifier of natural justice within international adjudication. Perhaps the most striking feature of Pinto's formulation is the express correlation between Natural Law (*ius naturale*), as the medium of the historical genesis of the Grotian Heritage, and Liberalism, understood here as the primary substantive concern of 'mainstream' international legal scholarship.²⁰ Any cursory examination of the jurisprudential corpus of International Law immediately reveals a doctrinal (dogmatic?) bias (prejudice?) in favour of a modern epistemology and metaphysic; the State as a rational and unitary actor capable of binding itself to non-derogable obligations.

II Grotius and Utopia

The ideological conceit of *ius naturale* as progenitor of 'Humane Governance' constitutes an indispensable part of the Grotian Heritage, both in its original 16th

- 16 Pinto, 'The New Law of the Sea and the Grotian Heritage', 91–2; 'The heart of Grotius' position...came eventually to be a foundation of the modern regime of the high seas; namely, that states may not individually or collectively acquire the high seas by occupation since they are *res communis omnium* or *res extra commercium*.' W. E. Butler, 'Grotius and the Law of the Sea', in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), 209, 211.
- 17 Saul Mendlovitz and Merav Datan, 'Judge Weeramantry's Grotian Quest', *Transnational Law and Contemporary Problems*, 7 (1997), 401–27, *passim*.
- 18 Richard Falk, 'The Grotian Quest', in Falk et al. (eds), *The Future of the International Legal Order. Volume One: Trends and Patterns* (Princeton: Princeton University Press, 1969), 36–42, *passim*.
- 19 'By humane governance, we mean a type of governance that is people- and human-rights centred rather than Statist and market-centred. The guiding principles of humane governance, both analytical and normative, include economic well-being, social justice, non-violence, ecological stability, and positive identity.' Ibid. 413. Falk defines Humane Governance as incorporating the renunciation of armed force in International Relations, Human Rights, the Common Heritage of Mankind, sustainable development, the Global Commons, the rights of Future Generations, the personal accountability of Heads of State under International Law, inter-generational equity, and global democracy. See Richard Falk, 'Humane Governance for the World: Reviving the Quest', *Review of International Political Economy*, 7/2 (2000), 317–34, *passim*.
- 20 Martti Koskenniemi, 'The Pull of the Mainstream', *Michigan Law Review*, 88 (1990), 1946–62, *passim*.

century form and in its 20th century re-appropriation, designated by Wight as the 'Rationalist Tradition.'

To call this [Grotian] tradition Rationalist is to associate it with the element of reason contained in the conception of Natural Law. The belief in natural law is a belief in a cosmic, moral constitution, appropriate to all created things including mankind [sic]; a system of eternal and immutable principles radiating from a source that transcends earthly power (either God or nature). But it is also a belief that man and woman has some inherent correspondence with this law, some inherent response to it, because of his or her possessing a rational faculty. Reason means the capacity to know this natural law and the obligations that it imposes; this law (of justice) is 'written in the heart.' Men and women in essence are rational creatures, not merely sentient beings. Reason is a reflection of the divine light in us: '*Ratio est radius divini luminis*.' This is the justification for using the word Rationalist in this special sense in connection with international theory.²¹

The phrase 'hermeneutics of suspicion' springs to mind when encountering an intellectual construction of such a kind.²² The difficulty here is not restricted to the level of the philosophical or the doctrinal; the passage, not at all a-typical of both International Law and International Relations scholarship operating within the domain of the 'Grotian Heritage,' signifies a generally a-historical bias, its signature emphasis upon 'continuity' notwithstanding. With sententious aplomb, Wight has remarked: 'Trying to pick a path...through the baroque thicket's of Grotius' work, where profound and potent principles lurk in the shade of for-

21 Martin Wight, *International Theory: The Three Traditions*, ed. Gabriele Wight and Brian Porter (Leicester: Leicester University Press, 1991), 14. Wight continues:

The Rationalist tradition is the broad middle road of European thinking. On one side of it the road slopes upward, towards the crags and precipices of revolutionism whether Christian or secular; on the other side it slopes downwards towards the marshes and swamps of realism. The origin of Rationalism is with the Greeks and especially the Stoics; its upkeep was later taken over by the Catholic Church, but its great merit has been that it was never exclusive to Catholics... In the Middle Ages Jewish and Arab thinkers travelled this road, and in modern times Protestants, humanists and Rationalists in the modern 'Rationalist Press Association' sense. It is potentially universal to mankind. It is a road on which I suppose all of us, in certain moods, feel that we really belong and it is the road with the most conscious acknowledgement of continuity. On it can be seen the stout figure of Thomas Aquinas, whom Acton called 'the first Whig'; also Vitoria, O.P. (1480–1546) and Suarez, S.J. (1548–1617), the Neo-Scholastics who make the bridge between the medieval tradition of natural law and modern international thought. Hugo Grotius is there, with his offspring and descendants among Grotian writers on international law, together with Hooker, Althusius and John Locke, and the Founding Fathers of the American Republic, at least Washington, Madison and Hamilton, to say nothing of Jefferson.

Ibid. 14–15

22 See Martti Koskenniemi, *From Apology to Utopia: The Structures of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989), *passim*.

gotten arguments and obsolete examples like violets beneath overgrown gigantic rhododendrons, I find that he does not say what I thought he said.²³ Floral imagery aside, it is apparent that what has come to be known as ‘the Grotian Heritage’, which plays such a central role in the discursive formation of the highly influential ‘British School’²⁴ of International Relations theory, is, in fact, a highly stereotyped and derivative reification. An Oxbridge and Ivy League innovation of the immediate aftermath of the Second World War, the British School settled on Grotius as a representational figure signifying a ‘median path’ between the perceived deficiencies of both Hobbesian Realism and Kantian Liberalism.

For the Grotians... international politics had to be described not as a hierarchy but as international intercourse, a relationship chiefly among states to be sure, but one in which there was not only conflict but also co-operation. To the central question of the Theory of International Relations the Grotians returned the answer that states, although not subject to a common superior, nevertheless formed a society—a society that was no fiction, and whose workings could be observed in institutions such as diplomacy, international law, the balance of power and the contest of great powers. States in their dealings with one another were not free of moral and legal restraints: the presumption of the Grotians was that states were bound by the rules of this international society that they composed and in whose continuance they had a stake.²⁵

Two signature trends emerge. Firstly, in order to make Grotius the seminal ‘Father’ of both an international legal and an international political ‘heritage’, it was necessary to discard and suppress the greater part of his actual writings. It comes as something of a shock to realize that virtually the entirety of the Grotian ‘school’ rests almost exclusively upon the *Prolegomena* of the chosen ‘foundational’ text, *De Jure Belli ac Pacis* (1625).²⁶ Haggenmacher’s incisive comments on the *Prolegomena* are especially pertinent in this regard.

23 Martin Wight, *Systems of States*, ed. with Introduction by Hedley Bull (Leicester: University of Leicester Press, 1977), 127.

24 Timothy Dunne, *Inventing International Society: A History of the English School* (New York: St. Martin’s Press, 1998), 1–22; Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002), 12–39.

25 Hedley Bull, ‘Martin Wight and the Theory of International Relations’, in Gabriele Wight and Brian Porter (eds), *International Theory: The Three Traditions* (Leicester: Leicester University Press, 1991), xii; See Adam Watson, *The Evolution of International Society: A Comparative Historical Analysis* (New York: Routledge, 1992), 1–18.

26 ‘What is generally drawn from Grotius (or rather from the *Prolegomena*...) is the feasibility of an (international) society of sovereign individuals (states) based upon the observance of a contract: could Grotius be a front for Locke here?’ Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), 206.

The real cohesion of *De Jure Belli ac Pacis* will not appear as long as we persist in considering it as a treatise on international law. It becomes wholly transparent, on the contrary, as soon as we perceive it in the light of the author's intention, which was... to write a book on the law of war. Law of war not as a fragment of international law, but almost as a self-contained legal discipline, such as it had gradually evolved since the days of the medieval scholastics and more especially during the sixteenth century. It is this development Grotius brings to a final culmination in his general theory of conflict. Viewed against this traditional background, the work becomes entirely meaningful and assumes a specific place in what might be termed the prehistory of international law [or, primitive legal scholarship?]²⁷

The second great conceit was to causally link the Grotian Heritage with its own self-grounding, and, therefore, self-legitimizing, world-historical 'event', in this case the Peace of Westphalia (1648).²⁸ A dual rhetorical stratagem is uncovered: not only is Grotius re-appropriated to meet the discursive objectives of an academic discipline, but the 'event' that comes to serve as the signifier of the sign is subsequently re-appropriated and re-deployed in a manner that is equally vulnerable to deconstructive technique. Gross has expressed the stereotypical Grotian 'view' of the Westphalian System.

The idea of an authority or organization about sovereign states is no longer. What takes its place is the notion that all states form a world-wide political system²⁹ or that, at any rate, the states of Western Europe form a single political system. This new system rests

27 P. Haggenmacher, 'On Assessing the Grotian Heritage', in T.M.C. Asser Institut (ed.), *International Law and the Grotian Heritage* (The Hague: T.M.C. Asser Institut, 1985), 150–60 at 156. See C.G. Roelofsen, 'Grotius and the Development of International Relations Theory: "The Long Seventeenth Century" and the Elaboration of a European States System', *Grotiana*, NS 18 (1997), 97–120 at 118:

De Iure Belli ac Pacis 'was not innovative, but in many senses rather a return to neo-Scholasticism. It was this very conservatism, a return to a common tradition before the religious conflicts, that was in tune with the secularisation of the European system in the last years of the Thirty Years War.

The deconstructive work of Onuma and contributors have rendered the text 'almost unintelligible as an international legal treatise.' Nicholas Greenwood Onuf, *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998), 49. Also See Anthony Carty, 'Japanese Deconstruction', *British Yearbook of International Law*, 66 (1995), 477–90, *passim*.

28 'Grotius' *De Jure Belli ac Pacis* is often combined with the Peace of Westphalia to locate in the second quarter of the 17th century the origins of the modern state system.' R. J. Vincent, 'Grotius, Human Rights, and Intervention', in Hedley Bull, Adam Roberts and Benedict Kingsbury (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 244.

29 Or 'society', for Adam Watson.

on international law and the balance of power, a law operating between rather than above states and a power operating between rather than above states.³⁰

For contemporary international legal scholarship, the principle of the balance of power has come to subsume the entirety of the Westphalian Legacy, the successful maintenance of the concrete 'power equilibrium' serving as the foundation of normative international public order.³¹ For Morgenthau, 'International Law owes its existence and operation to two factors, both decentralised in character: identical or complimentary interests of individual states and the distribution of power among them. Where there is neither community of interest nor balance of power, there is no international law.'³²

The discursive cycle is now complete; both History and Theory are thoroughly enmeshed to yield a hermetically sealed and internally consistent 'universal truth' (i.e. Universalism), praxis and doctrine complementing each other perfectly.

If we wish to persist in considering Grotius together with Hobbes as a key figure in international relations theory, we can only do so if we point to the one element in the European states system where a persistent 'Grotian' influence, a 'Grotian tradition' can indeed be traced: the distinctive claim for that system from the beginning, that it should not only be a well-ordered system, but that it should also be a *legal* system. The European states system has always pretended to justice as well as to order. Legal considerations have throughout its history exercised a restraining influence on its members' behaviour. One may wonder whether without Grotius' persistent influence the legalistic tradition transmitted from medieval Christendom to the early modern period would have survived the seventeenth-century political and intellectual crisis as a vital element within the system. In that sense there is indeed a connection between Grotius and 'the Westphalian States system'.³³

30 Leo Gross, 'The Peace of Westphalia, 1648–1948', *American Journal of International Law*, 42 (1948), 20–41 at 29; 'The idea of international society which Grotius propounded was given concrete expression in the Peace of Westphalia' Hedley Bull, 'The Importance of Grotius in the Study of International Relations', in Hedley Bull, Adam Roberts and Benedict Kingsbury (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 65–94 at 75. See also Herbert Butterfield, 'The Balance of Power', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (London: George Allen & Unwin, 1966), 132–48, *passim*, and Martin Wight, 'The Balance of Power' in *id.*, 149–75, *passim*.

31 Wight, 'The Balance of Power', *passim*; Alfred Vagts and Detlev F. Vagts, 'The Balance of Power in International Law: A History of an Idea', *American Journal of International Law*, 73 (1979), 555–80 at 557–9, 569–70 and 580.

32 Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace. Brief Edition*, rev. Kenneth W. Thompson (New York: McGraw-Hill, 1981), 255–6.

33 Roelofsen, 'Grotius and the Development of International Relations Theory', 120. The classic formulation is Bull's: 'The idea of international society which Grotius propounded was given concrete expression in the Peace of Westphalia, and Grotius may

Or, as Koskenniemi has impishly remarked: ‘the modern policy-maker or lawyer is neither a (pure) Hobbesian realist or a (pure) Rousseauian utopian. Today everybody is a suave (Grotian) eclectic.’³⁴

Central to the deconstruction of this formidable rhetorical complex is a subversive/iterable critique of the Westphalian State system itself, coupled with the critical historicist awareness that the genealogical starting-point of the Grotian/Rationalist tradition was a global conflict of ethnocidal proportions: the Thirty Years War (1618–48). The challenge for critical theory is to subvert the self-serving representation of Rationalism as an oppositional force to ‘contra-rational’ interstate conflict by demonstrating that the origins of the Grotian Heritage itself are inextricably embedded within an *antithetical* historical context. At this delicate juncture, ‘guilt by association’ effectively operates as an act of de-legitimation, necessitating an alternative interpretation of the ‘Grotian Heritage’.

III International Law and Natural Law

The critical problem here concerns the almost ‘archaic,’ or ‘primitive,’ nature of International Law. In Grotius’ own indomitable style: ‘The act of commanding is a function of power, and primary power over all things pertains to God, in the sense that power over his own handiwork pertains to the artificer and power over their inferiors, to their superiors.’³⁵ As virtually all problems in the field concern issues of sovereignty, the ‘holy grail’ of normative internationalist jurisprudence becomes the quest for the self-sufficient grounds of a ‘super-sovereignty’ that can compel the obedience of the Nation-State. ‘Nothing in the international sphere must bind states unless they consent to be bound—unless the source of the obligation is the absolute sovereign’;³⁶ from this it necessarily follows that, as Ko-

be considered the intellectual father of this first general peace settlement of modern times.’ Bull, ‘The Importance of Grotius in the Study of International Relations’, 75.

34 Martti Koskenniemi, ‘The Police in the Temple: Order, Justice and the UN: A Dialectical View’, *European Journal of International Law*, 6/3 (1995), 325–48 at 328.

35 Hugo Grotius, [*De Indis*] *De Iure Pradae Commentarius. Commentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (Wildy & Sons: London, 1964), 8.

36 Kennedy, *International Legal Structures*, 161. Kennedy has expounded on this issue at length in his ruminations concerning legal education and the politics of the academy.

All of these possibilities [in the academic study of International Law]...are the study of power. It has always been said that international law, so occupied with sovereignty, is a field that focuses one’s attention on power: and I think that this is correct. Not as we have understood power: as the object of policy, the possession of sovereignty, the cause of doctrine or the handmaiden of law, but as power flows among us, continually regenerated by our social and doctrinal practices of distinction and reified connection. It is quite easy in the field of international law to uncover the presence of the law in violence, of the State in terrorism, and of our aspirations in their defeat. To understand power in this way, one has to relinquish both the common desire to possess it and fan-

skenniemi has stated in his trademark style of ironical inversion, 'once the idea of natural law is discarded, it seems difficult to justify an obligation that is not voluntarily assumed.'³⁷

The initial rupture between positivist jurisprudence and international law was dictated by fidelity to legal positivism's core dogmas. Subsequent attempts to reintegrate international law into positivist jurisprudence have failed because legal positivism is incapable of furnishing a coherent explanation of international law's obligatory character. This incapacity is the result of legal positivism's radical refusal to acknowledge the juridical character of any object which is not sourced to an act of sovereign will located in history. In particular it expels from the realm of legal thought those pre-positive juridical norms of the natural law, from which the positive law draws all its authority.³⁸

The operational, albeit sublimated, centrality of Natural Law to contemporary international jurisprudence is well formulated by Lauterpacht.

The fact is that while within the State it is not essential to give to the idea of a higher law—of natural law—a function superior to that of providing the inarticulate ethical premises underlying judicial decisions or, in the last resort, of the philosophical and political justification of the right to resistance, in the international society the position is radically different. There—in a society deprived of normal legislative and judicial organs—the function of natural law, whatever may be its form, must approximate more closely to that of a direct source of law. In the absence of the overriding authority of the judicial and legislative organs of the State there must assert itself—unless anarchy

tasies about its sudden deployment for good or ill. I think that students of international law should reformulate their sense of cause and effect in international affairs: rejecting reliance upon visions both of State interests that we too often take to propel doctrine and of the law that we take to restrain statesmen.

Kennedy, 'International Legal Education', 380–1.

37 Koskenniemi, 'The Pull of the Mainstream', 1946.

38 Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism', *European Journal of International Law*, 12 (2001), 269–307 at 271.

To a 'positivist' jurist, public international law is fundamentally those 'rules' agreed by humans to be rules that they undertake to obey in their activities as statespeople. Of course, the notion that 'agreement' to rules makes those rules 'binding' in any normative sense, is itself a 'rule' of rule-formation, and rests on assumptions and convenience; so 'positive law' is inherently based on 'natural law' assumptions. Thus, even assuming that otherwise 'positive' law is the simplest model for the international legal order, and ignoring the weakness of its roots as a complete system, there is a level of rules beyond that, rules that exist in the practical world of affairs regardless of the will of jurists, rules of 'natural law'.

Alfred P. Rubin, 'Humanitarian Intervention and International Law', in Aleksander Jokic (ed.), *Humanitarian Intervention: Moral and Philosophical Issues* (Toronto: Broadview Press, 1993), 109–22 at 109.

and stagnation are to ensue—the persuasive but potent authority of reason and principle derived from the fact of the necessary coexistence of a plurality of States. This explains the pertinacity, in the international sphere, of the idea of natural law as a legal source.³⁹

Within the ‘anarchic’ interstate system of the World-System, Natural Law performed the necessary function of ‘Leviathan’ in providing the requisite minimum of international order. The foundational doctrinal role played by Naturalism within *De Indis*⁴⁰—Grotius having significantly repudiated the ‘positivist’ doctrine of prescription⁴¹—underlines the necessity of transcendental reasoning within a radically pluralized trans-national juro-political space.⁴² The rhetorical convergence(s) of Positivism with Naturalism is a foundational (albeit largely unrecognised) premise of contemporary International Law; the critical doctrine of *ius voluntarium* performs the necessary function of ‘mimetic substitution’ between Natural and Positive law.⁴³

Not surprisingly, twentieth-century International Law ‘devotes a great deal of attention to its sources.’⁴⁴ Grotius himself clearly anticipates this development: *De Indis* is premised upon an axiomatic Naturalism, both ‘God’ and ‘Nature’—in descending order—serving as the twin pillars of compelling international legal obligations.

[Man is] one who is peculiarly endowed not only with the affections shared in common with other creatures but also with the sovereign attribute of reason... a being derived from God Himself, who imprinted upon man the image of His own mind... To be sure, this rational faculty has been darkly beclouded by human vice; yet not to such a degree but that the rays of the divine light are still not clearly visible, manifesting themselves especially in the mutual accord of nations. For evil and falsehood are, in a sense and by their very nature, of infinite extent and at the same time internally discordant, whereas universal concord can exist only in relation to that which is good and true. Many persons... have chosen to call that very accord the secondary law of nature, or primary law of nations; and Cicero has said that the principle informing this law is nothing more or less than right reason [*recta ratio*] derived from the will of God.⁴⁵

39 Lauterpacht, ‘The Grotian Tradition in International Law’, 331.

40 Grotius, *De Indis*, 11–12.

41 Ibid. 249.

42 See below, Chapters Two and Three.

43 Eric Wilson, ‘*Mare Liberum* and *Opinio Juris*: A Grotian Reading of the North Sea Continental Shelf Cases’, *Monash University Law Review*, 28/2 (2002), 299–326, *passim*.

44 Kennedy, *International Legal Structures*, 11.

45 Grotius, *De Indis*, 11–12.

The entirety of the Text orbits around this binary hierarchical division between a conflated Providential and Natural Law, *ius gentium primum*, and the positively expressed secondary Natural Law, *ius gentium secundarium*, identical to the 'primary' law of nations. In a manner that does great violence to contemporary expectations—not the least because of the superficial commonplace view of Grotius having 'secularised' international law—the normative value of 'Civil' or municipal law is expressly determined not merely by its concordance with positive international precepts, but with the *lex aeterna* of Providential Will, or Divine Presence: 'For what could be clearer than the fact that a custom diametrically opposed to the law of nature, or to the law of nations, is not valid? Custom is a form of positive law,⁴⁶ and positive law cannot invalidate universal precepts.'⁴⁷

The formation of customary international law and the contractually binding nature of State responsibility are stereotypical examples of this tendency. As Allott has remarked, in a manner replete with 'transcendental'⁴⁸ reasoning,

In international law, there is really only one problem, what to do about natural law. In this sense natural law should be understood, not in the religious sense which would explain its existence in terms of the divine origin of nature, but in a secular system. The question raised by natural law is whether it can be said that a legal system, such as international law, should conform to some general underlying pattern or principle, or whether it must be said that the rules of international law must justify themselves in their own terms and in terms of their end-purposes as being useful to, and accepted by, States.⁴⁹

46 Which, for contemporary legal scholarship, is the entire point.

In order to 'privilege' the particular line that she chooses, the theorist must give some subordinate importance to the consent and actions of states. Thus, whereas the positivists started by positing consent as the source of international law and were driven to rely upon some ever receding normative background, the natural lawyers started by relying on a deep normative order and ended up depending on manifestations of consent in order to save their project from being branded as either hopeless idealism or craven apologetics.

James Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', in Koskeniemi (ed.), *International Law* (New York: New York University Press, 1992), 121–53 at 151–2.

47 Grotius, *De Indis*, 249. See below, Chapters Three and Four.

48 Throughout this thesis, the term 'transcendental' is used not to signify the Platonic 'other-worldly' or 'supra-sensible' but the Derridean notion of a non-evident but logically necessary sub-text that textually governs the production of meaning within the superficial or apparent text. See Jacques Derrida, 'White Mythology', in *Margins of Philosophy*, trans. with additional notes Alan Bass (Brighton: Harvester Press, 1986), 207–71, *passim*; 'Abstract notions always hide a sensory figure.' *Ibid.* 210.

49 Philip Allott, 'Language, Method and the Nature of International Law', *British Yearbook of International Law*, 45 (1971), 79–135 at 100.

Opinio iuris sive necessitatis (the subjective component) and the historically grounded *usus diuturnus*/'consistency of state practice' (the objective component) both serve as manifestations 'of the system of consensual law-making that is customary international law.' Crucial to this re-constructive enterprise is the implicit assumption of the inherent transparency of both the legal identity and the political intent of the State actor.⁵⁰ Traditionally recognized sources of both State practice and *opinio iuris* include diplomatic correspondence, diplomatic instructions and communiqués, municipal law, court rulings, treaties, negotiations, international agreements, and the practices on international inter-governmental agencies. Expressed formally, State practice constitutes the material element, going to certain past uniformities of behaviour, and *opinio iuris* constitutes the psychological element, going to 'certain subjectivities of 'oughtness' attendant upon such past behavioural uniformities.' Hence, the 'traditional points of reference for determining the existence of a customary norm are patterns of communicative behaviour involving physical episodic conduct.' It is precisely this synthesizing 'episodic conduct' that constitutes the essence of international legal obligation, which is, in turn, demonstrative of the objective juro-political reality of the customary norm.⁵¹ In formal philosophical language, International Law has collapsed the distinction between the substantive and the phenomenological. According to Allott, this mandated convergence of legal doctrine with praxis belies a manifestly politicised configuration of judicial policy as expression of State policy.

Law conceives social reality as an abstraction, then re-abstracts it in the form of generalised legal relations. To do law is necessarily to do theory. Law is the application of ideas to material reality, with a view to re-forming human consciousness, that is to say, with a view to being a cause of conforming behaviour. To do law is, inevitably, to act philosophy... [Consequently] each time that a writer, or Government or a tribunal carries out the process (forming a pattern of behaviour from the subject's own internal patterns, and from the patterns of all those who have carried out the process before and

50 For what follows, See Wilson, 'Mare Liberum and *Opinio Juris*: A Grotian Reading of the North Sea Continental Shelf Cases', *passim*. Also See Kennedy, *International Legal Structures*, *passim*; Michael Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law*, 47 (1974–1975), 1–53, *passim*; Olufemi Elias, 'The Nature of the Subjective Element in Customary International Law', *International and Comparative Law Quarterly*, 44/3 (1995), 501–20, *passim*; Jo Lynn Slama, 'Opinio Juris in Customary International Law', *Oklahoma City University Law Review*, 15 (1990), 603–55, *passim*; Olufemi Elias and Chin Lim, 'Some Tentative Epistemological Claims Concerning the Basis of Customary International Law', *Cambrian Law Review*, 25 (1994), 103–25, *passim*.

51 Anthony D'Amato, 'Is International Law Really 'Law'?', in Martti Koskenniemi (ed.), *International Law*, 35–46. See Martti Koskenniemi, 'The Normative Force of Habit: International Custom and Social Theory', in id. (ed.), *International Law*, 213–89, *passim*.

whose results are known to the subject), the resulting pattern becomes more dense, more autonomous of the will of the subject, and in this sense, more objective.⁵²

The sheer repetitiveness of the action/process itself generates over time the amount of 'ontological weight' necessary to render the process legally binding, or customary.⁵³ Allott's formulation of the problem is of great significance in understanding Public International Law, predicated upon the twin pillars of State practice and uniform consistency over time. As Allott reminds us, the effect of International Law upon natural and/or legal actors other than States ultimately depends upon the operation of extra-juridical social processes. The concept of customary international law, then, is integral to the entire public international law regime, both in its instrumental dimension (functional), as well as in its normative one, effecting a global substitution of international public interest (communitarian) for traditional Nation-State self-interest (atomistic). Allott's shift of analytic focus towards the communitarian-based model of 'public interest' forces a correlative redefinition of the nature and purpose of the (now) subordinate atomistic Nation-State units. Henceforth, sovereign states are to be regarded as the composite 'constitutional organs of international society', the loci of collectively delegated governmental powers (as opposed to traditional exclusionary territorially-derived powers). This inverted re-formulation of the international community is legitimated, in turn, through the prioritisation of the public interest over the 'private' (i.e. unilateral statism) and the correspondent postulation of collective social objectives as the 'true purpose' (*telos*) of international society. The exhaustive identification of international community with a public interest/trust paradigm highlights the radical juro-political potential of customary law. Within such a strongly internationalist system, 'the subjects of the law, by willing and acting for the sake of obeying the law, are privileged to become part of the legislator [hitherto the exclusive role of the sovereign State] because their behaviour, in be-

52 Allott, 'Language, Method and the Nature of International Law', 134.

Questions as to whether and why states obey international law are no longer meaningful. It can now be seen that States neither obey nor disobey international law; they simply act so as to demonstrate acceptance of the ideology of international law. The crucial point here, of course, is that the entire edifice of the 'ideology' of international law is underpinned by the sum total of customary practice. Power is not a consideration distinct from international law. It appears that the idea of international law is an important form of power in international relations.

Shirley V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics', *European Journal of International Law*, 5/3 (1994), 313–25 at 324

53 'The pattern of repetitions, associations and references which characterise public international law seems suited to a practice of interminable discourse.' Kennedy, *International Legal Structures*, 294.

ing intentionally law conforming, is behaviour for the sake of the public interest of the whole society.⁵⁴

Understandably, the contemporary 'debate' over the presence of Natural Law within Public International Law hinges largely on the resolution of the question as to whether *ius naturale* should be understood in a theological/ontological or in a functionalist/pragmatic sense. International Law conventionally inducts a generalised normative 'ought pattern' from three main empirical sources: (i) the historical record of empirical State practice; (ii) the evidenced pattern of the juridical opinion of 'experts' who have attempted to determine international custom; and (iii) the professional jurist attempting to determine International Law within a particular situation. Although the 'modern' resolution of the Is/Ought dichotomy is predominately functionalist/pragmatist, it nevertheless implicitly—and necessarily—recapitulates the internal metaphysical logic of post-theistic thought through the grounding of a universal imperative norm upon a trans-historical and neo-transcendental authoritative source. Currently, State practice accomplishes this rhetorical manoeuvre by means of a *sub rosa* mimetic⁵⁵ substitution of the earlier, or 'primitive', ontological categories of God/Nature. State practice is critically interrogated for the purpose of 'un-covering' some determinatively grounding expression of both intent and belief that, when finally 'read', can be actively deployed *against* the State for purposes of authoritatively—or 'expertly'—proclaiming that State's objectively binding obligations under International Law.⁵⁶ As all acts of hermeneutical reconstruction are ultimately acts of faith, International Law hopes that a dual pattern will stand 'revealed': a pattern of practice empirically established from the historical record of State practice, and an inferentially derived (deductive) pattern of subjective or 'internal' belief, which is both the grounds for and the determinant sign of that State's 'boundedness' under *opinio iuris*. According to Allott, 'this is the best meaning to give to the classical concept of *opinio iuris*, which otherwise tends to the supposition of a situation in which States were mistakenly believing that there was a legal requirement to do what they were doing.'⁵⁷ The language here is highly suggestive of the presence of a *legal fiction*; not surprisingly, this interpretative strategy proves inextricable from the 'material' or 'institutional' production of textual discourse itself.

54 Philip Allott, 'Mare Nostrum: A New International Law of the Sea', in Jon M. Van Dyke, Durwood Zaelke and Grant Hewison (eds), *Freedom of the Seas in the 21st Century: Ocean Governance and Environmental Harmony* (Washington D.C.: Island Press, 1992), 49–71 at 60–1.

55 From the Greek *mimesis*: the 'evocative' re-production of an Original/Other, the antithesis of 'self-present' truth. See Christopher Norris, *Derrida* (London: Fontana Press, 1987), 46–62.

56 In this way, the doctrinal dilemma of overtly 'criminalising' the lawful Sovereign in the event of an alleged breach of International Law has historically been avoided, but this may not last given the continuing 'War against Terror'.

57 Allott, 'Language, Method and the Nature of International Law', 103.

Writing about international law is writing about philosophy. [A puzzling] leap across space has to be made—from ‘is’ to ‘ought’. Much effort has been spent by classical philosophy and legal philosophy on the problem of how such a leap can be made consistently with logic or, at least, with comprehensive intellectual processes. Essentially, the problem is that, from a logical point of view, manipulation of ‘is’ propositions should not lead to an ‘ought’ proposition.⁵⁸

IV Hegemony and Governance: The Juridical Legitimation of International Public Order

International Law, through its historically derived reliance upon both Naturalism and Liberalism, is inherently fraught with potentially subversive issues of philosophical and political concern. Historical sociologists such as Wallerstein have demonstrated that Liberalism—and, by extension, its seventeenth-century progenitor, Natural Law—forms a central pillar of ‘geo-culture’, the ideological legitimation apparatus of the interstate system⁵⁹ that doubles as the ‘operational domain’ of Public International Law. For Allott, International Law ‘has a three-fold social function: (1) Law carries the structures and systems of society through time; (2) Law inserts the common interest of society into the behaviour of society-members; and (3) Law establishes possible futures for society, in accordance with society’s themes, values and purposes.’⁶⁰ For Wallerstein, Liberalism as geo-culture signifies national self-determination, Developmentalism, the universality of moral and cultural values, the objective nature of Science and Technology (i.e. an intelligible universal order), Progressivism, and democratic governance.⁶¹ Through a series of highly precise mimetic substitutions—Science for *recta ratio*; universal morality for *ius naturale*—Liberalism is able to legitimise itself as both historical successor to and as philosophical surrogate of Naturalism.⁶²

58 Ibid. 101.

59 Immanuel Wallerstein, *Unthinking Social Science: The Limits of the Nineteenth-Century Paradigm*, 2nd edn (Philadelphia: Temple University Press, 2001), 7–22; Immanuel Wallerstein, *After Liberalism* (New York: New Press, 1995), 1, 49 and 72–122. For a more detailed discussion of the concept of geo-culture, see Chapter Two, below.

60 Philip Allott, ‘The Concept of International Law’, in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 69–89 at 69.

61 Wallerstein, *After Liberalism*, 49.

62 Natural Law and contemporary International Law share a common historical progenitor in Religion. John E. Noyes, ‘Christianity and Late Nineteenth-Century British Theories of International Law’, in Mark W. Janis (ed.), *The Influence of Religion on the Development of International Law* (Dordrecht: Martinus Nijhoff Publishers, 1991), 85–106, *passim*; David Kennedy, ‘Images of Religion in International Legal Theory’, in Janis (ed.), *The Influence of Religion on the Development of International Law*, 137–45, *passim*; Mark W. Janis, ‘Protestants, Progress and Peace: Enthusiasm for an International Court in Early Nineteenth-Century America’, in id. (ed.), *The Influence*

Geo-Culture serves to legitimise a vast array of inherently inequitable and exploitative international relationships through the re-presentation of such arrangements as either 'progressive' or 'natural', in the same way that Liberalism and Natural Law serve to legitimise inequity within the domestic/municipal sphere: an arbitrary social order is invested with 'necessity' through its correlation with *recta ratio* and/or its consistency with 'natural' justice or progress.⁶³ The classic example here is the way in which multilateralism, the *idée fixe* of post-1945 International Law can, in fact, be shown to constitute a very specific set of institutional arrangements and practices that facilitate the unilateral statist interests of the United States: the successful transposition of the 'New Deal' onto the global plane as a means of securing US hegemony.⁶⁴

of Religion on the Development of International Law, 223–42, *passim*; Hilaire McCoubrey, 'Natural Law, Religion and the Development of International Law', in Mark W. Janis and Carolyn Evans (eds), *Religion and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1999), 177–89, *passim*; Mark W. Janis, 'American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition', in Janis and Evans (eds.), *Religion and International Law*, 211–33; David Kennedy, 'Losing Faith in the Secular: Law, Religion and the Culture of International Governance', in Janis and Evans (eds.), *Religion and International Law*, 309–19, *passim*.

- 63 Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine', *Yale Law Journal*, 94 (1985), 999–1114 at 1006–7:

The critique of Liberalism connects this central tension [of legitimation] within legal thought to the possibility of systematic (although not necessarily conscious) oppression by the 'haves' of the 'have-nots', through the manipulation of inconsistent but equally legitimate strands of legal argument. This is not a crude determinism, but an explanation of how a legal order that proclaims itself to be based on democratic principles, individual rights, due process, and equal protection can still operate to exclude important constituencies from the benefits available within the society.

- 64 'The most that can be said about a hegemonic power is that it will seek to construct an international order in some form, presumably along lines that are compatible with its own international objectives and domestic structures.' John G. Ruggie, 'Multilateralism Matters', in id. (ed.), *Multilateralism Matters* (New York: Columbia University Press, 1993) 1–25 at 25. The institutionalisation of US hegemony formed the keystone of American foreign policy during the Second World War.

Though convinced that post-war affairs would operate under a system of Great Power control [i.e. the five Permanent Members of the Security Council], with each of the powers holding special responsibility in their geographical space, Roosevelt felt compelled to obscure this idea through a United Nations organization which would satisfy widespread demand in the United States for new idealistic or universalist arrangements for assuring the peace.

Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy* (Oxford: Oxford University Press, 1979), 536.

John G. Ikenberry, 'American Empire and the Empire of Capitalist Democracy', in Michael Cox, Tim Dunne, and Ken Booth (eds), *Empires, Systems and States: Great Transformations in International Politics* (Cambridge: Cambridge University Press, 2001), 191–212, *passim*. On the USA-hegemonic function of the IMF and the IBRD in particular, See Anne-Marie Burley, 'Regulating the World: Multilateralism, Inter-

There has been a recent upsurge in interest in both International Law and International Relations scholarship in the evasive concept of *hegemony*. This was to be expected; the U.S. interventions into both Afghanistan and Iraq have done much to contribute to the perception—or fear—that the United States has transversed from its traditional international role as the multilateralist guarantor of a liberally benign ‘informal empire’ to the unilateralist enforcer of a more militaristic ‘formal empire.’⁶⁵ The collapse of American foreign policy into militarism

national Law, and the Projection of the New Deal Regulatory State’, in Ruggie (ed.), *Multilateralism Matters*, 125–56, 58–74.

The multilateralism that characterizes the post-war international regime is a fundamental characteristic of a *liberal* world order. In particular, it is a characteristic of international institutions designed by the United States—the liberal state most inclined and most able to project its domestic political and economic arrangements onto the world. The distinctive features of multilateralism—the emphasis upon general organizing principles, with the corollary characteristics of indivisibility and diffuse reciprocity—are also the organizing principles of the liberal conception of the polity. The United States sought to project these principles onto the world as a macrocosm of the New Deal regulatory state.

(Ibid. 14)

The crucial feature of Roosevelt’s vision:

was that security for the world had to be based on American power exercised through international systems. But for such a scheme to have broad ideological appeal to the suffering peoples of the world, it had to emanate from an institution less esoteric than an international monetary system and less crude than a set of military alliances or bases.

Schurmann, cited in Giovanni Arrighi, *The Long Twentieth Century* (London: Verso, 1994), 67.

Yet, it is precisely the recent emergence of a nakedly militaristic ‘base-ism’ as the central pillar of U.S. hegemony that indicates the rise of a ‘crude’ mode of global governance concomitant with the relative decline of the U.S. on the economic and political fronts. See Chalmers Johnson, *The Sorrows of Empire: Militarism, Secrecy and the End of the Republic* (Verso: London, 2004). As Kennedy has usefully reminded us, ‘I cannot think of another legal discipline [besides International Law] in which the basic organizing ideas of the liberal state system are so visible in the doctrinal structure.’ Kennedy, ‘International Legal Education’, 378. See Koskenniemi, ‘The Police in the Temple: Order, Justice and the UN – A Dialectical View’, *passim*.

- 65 Emmanuel Todd, *After Empire: The Breakdown of the American Order* (Columbia University Press: New York, 2003); Michael Mann, *Incoherent Empire* (Verso: London, 2003); Immanuel Wallerstein, *Alternatives: The United States Confronts the World* (Paradigm Publishers: London, 2004); Joseph S. Nye Jr., *The Paradox of American Power: Why the World’s Only Superpower Can’t Go It Alone* (Oxford University Press: New York, 2002). ‘Whereas in the recent past American power was hegemonic—routinely accepted and often considered legitimate abroad—now it is imposed at the barrel of a gun. This undermines hegemony and the claim to be a benevolent Empire. Incoherence among its military, economic, political and ideological powers forces its retreat to its strongest resource, offensive military devastation.’ Mann, *Incoherent Empire*, 252.

is wholly consistent with Nikolai Kondratieff's notion of the 'A' and 'B' phases of the hegemonic cycle; as the hegemon loses secular political and economic dominance it will increasingly resort to unilateralist military solutions to the problems of global governance. This perception would prove to be well-founded if, as appears to be the case, that the primary purpose of the American occupation of Iraq was to uphold the status of the U.S. national currency as the world reserve currency—the 'petro-dollar'—in the face of a potential challenge by the Euro;⁶⁶ such a move, for such a purpose, would be striking confirmation of a comparative regression towards a more archaic form of inter-imperialist rivalry between the United States and the other member states of the core zone of the Modern World-System.

Although signifying both 'dominance' and 'domination,' hegemony, following its Thucydidean origin, most generally signifies 'leadership.' It is, therefore, an eliding concept, occupying an elliptical space between power and consent. In terms of practical operation, it proves inextricable from legitimacy, multilateralism, and, most importantly, global governance; 'What distinguishes hegemony from unipolarity appears to be a relational element. Hegemony can be defined as capabilities that are matched by influence over other states in the international system.'⁶⁷ The element of irreducible uncertainty in all discussions of hegemony is the precise relationship between hegemonic leadership and the antinomies of unilateralism and multilateralism. If 'influence' is a necessary attribute of hegemony, and 'influence' is equivalent to 'consent,' then a truly hegemonic power can

66 See William R. Clark, *Petrodollar Warfare: Oil, Iraq and the Future of the Dollar* (Gabriola Island, B.C., 2005), *passim*. In order to prolong its hegemonic status, the United States may have shifted to a new doctrine of military intervention identified by Wood as 'infinite war'; devoid of traditional considerations of spatio-temporal limitations, the 'new doctrine of war that seems to be emerging is a necessary corollary to a new form of empire... It is this endless possibility of war that imperial capital needs in order to sustain its hegemony over the global system of multiple states.' Wood, 'Infinite War', 8 and 25. The existence of the Nation-State is a necessary precondition for the operation of the Capitalist World-Economy. See Leo Panitch, 'The New Imperial State,' *New Left Review*, 2 (2000), 5-20, *passim*.

It was not through formal empire, but rather through the reconstitution of states as integral elements of an informal American empire, that the international capitalist order was now organized and regulated. Nation states remained the primary vehicles through which (a) the social relations and institutions of class, property, currency, contract and markets were established and reproduced; and (b) the international accumulation of capital was carried out. The vast expansion of direct foreign investment worldwide, whatever the shifting regional shares of the total, meant that far from capital escaping from the state, it expanded its dependence upon *many* states.

Leo Panitch and Sam Gindin, 'Global Capitalism and American Empire,' *Socialist Register* 42 (2004), 1-42 at 17 and 19. As a result, since 'the American empire can only rule through other states, the greatest danger to it is that the states within its orbit will be rendered illegitimate by virtue of their articulation to the imperium.' Ibid. 33.

67 Elke Krahmann, 'American Hegemony or Global Governance? Competing Visions of International Society,' *International Studies Review*, 7 (2005), 531-45 at 533.

never be formally imperialistic or predominantly unilateralist in its approach to the World-System. But the achievement of clarity is thwarted through Empire's utilisation of consent in maintaining imperial unity while minimizing expenditure; to some unspecified degree hegemony clearly relies upon 'persuading or rewarding subordinates rather than immediately coercing them, although even an empire... is never reliably achieved by purely coercive means.'⁶⁸

As is often the case with concepts of uncertain domain, a degree of precision may be obtained through viewing the unstable term in relation to another; in this sense, we may argue that hegemony only possesses coherence when juxtaposed to governance.⁶⁹ It is only through the operational exercise of hegemonic function through the mechanisms of governance that we are able to mark the changes in 'influence and policies [that] determine whether we are faced with non-hegemonic, hegemonic, or imperialist unipolarity.'⁷⁰ Not surprisingly, governance, particularly 'global governance', like the term 'Globalisation' with which it is so frequently co-joined,⁷¹ itself elides precise or exhaustive definition.⁷² A classic

68 John Agnew, 'American Hegemony into American Empire?', *Antipodes*, 35 (2003), 871-85 at 876.

69 Overbeek has made this clear in his discussion of the specifically Gramscian dimensions of Hegemony, both national and international.

In developed and complex capitalist societies, the political power of the ruling class does not rest exclusively or primarily on the control of the coercive apparatus of the state, but is diffused and situated in the myriad of institutions and relationships in civil society... The concept of hegemony thus defined is of key importance in discussions of 'global governance', since hegemony refers to exactly the same apparent plurality of 'sites of governance' that is recognized in much of the global governance literature but explicitly links this plurality to an underlying class-based exploitative hierarchy.

Henk Overbeek, 'Global Governance, Class, Hegemony: A Historical Materialist Perspective', Working Papers Political Science, No. 2004/01 (February 2004), Vrije Universiteit Amsterdam, 1-20 at 3.

Throughout this book I rely upon the World-Systems Analysis notion of hegemony which, although clearly indebted to Gramsci, is not strictly identical to the Gramscian model.

70 Krahmann, 'American Hegemony', 354.

71 'The rise of global governance arrangements seems to have been fostered in part by the processes of globalization, and in part by the national governments themselves through their adoption of neoliberal ideas that have encouraged greater use of private actors.' Elke Krahmann, 'National, Regional, and Global Governance: One Phenomenon or Many?', *Global Governance*, 9 (2003), 323-46 at 330. On the revealing interrelationships between global government and neo-liberal privatisation strategies, see Ray Kieley, *Empire in the Age of Globalisation: U.S. Hegemony and Neoliberal Disorder*, (Pluto Press: London, 2005), *passim*. For further discussion, see below, this Chapter.

72 'Governance does not mean "government" or we would say that instead. Since the international system notoriously lacks hierarchy and government, the word *governance* is used instead... In other words, we say "governance" because we don't really know

formulation, rich in deconstructive potential, is offered by Rosenau; governance denotes

The command mechanism⁷³ of a social system and its actions that endeavour to provide security, prosperity, coherence, order and continuity to the [social] system... Taken broadly, the concept of governance should not be restricted to the national and international systems, but should also be used in relation to regional, provincial, and local governments as well as other social systems such as education, and the military, private enterprises and even to the microcosm of the family.⁷⁴

Governance is inherently extra-governmental; while it encompasses formal government, it 'also includes any actors who resort to command mechanisms to make demands, frame goals, issue directives, and pursue policies'.⁷⁵ The effective exercise of governance is inextricable from the wider phenomenon of Legitimacy,⁷⁶ voluntary obedience to consensus-generated inter-subjective systems of rules.⁷⁷ Although not necessarily backed by 'any legal or constitutional authority,' legitimacy exists wherever some sort of governance system predictably and effectively guarantees the completion of those 'tasks that have to be performed to sustain the routinized arrangements of prevailing order and that may or may not be performed by government'.⁷⁸ This pragmatic nexus between legitimacy and performance through the successful exercise of extra-judicial governance ultimately yields the production of authority.⁷⁹ Accordingly, governance 'is any

what to call what is going on.' Laurence S. Finkelstein, 'What is Global Governance?', *Global Governance*, 1 (1995), 367–372 at 367 and 368.

73 Alternatively, 'control' or 'steering mechanism'. James N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997), 145–9.

74 Ibid. 145.

75 'Governments exercise rule, governance uses power.' Ernst-Otto Czempiel, 'Governance and Democratization', in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), 250–71 at 250.

76 Ann-Marie Slaughter, 'Governing the Global Economy through Government Networks', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 177–206 at 195–6.

77 James N. Rosenau, 'Governance, Order and Change in World Politics', in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), 1–29 at 4.

78 Ibid. 6.

79 Rodney Bruce Hall and Thomas J. Biersteker, 'The Emergence of Private Authority in the International System' in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 3–22, *passim*. Rosenau's work is the epitome of what might be

purposeful activity intended to 'control' or influence someone else that either occurs in the arena occupied by nations or, occurring at other levels, projects influence into that arena.⁸⁰ Krahmann has usefully identified seven critical analytical domains through which networked governance, as opposed to statist government, operates: geography; function; resource distribution; interests; norms; decision-making; and policy implementation. Central to her concern, however, is the wider inter-linkage between governance and geographical fragmentation. As governance is appositional to government,⁸¹ the monistic spatial unity of political authority is fractured within the operational domain of the former term; geographical fragmentation, obviating the state as the central unit of analysis, 'specifically takes three forms: "downward" to local bodies, "upward" to international organizations, and "sideways" to private and voluntary actors.'⁸²

What is common to all definitions of governance, global or otherwise, is a strictly anti-essentialist approach to statist form through their common emphasis upon 'the changing locus of authority.'⁸³ As Finkelstein rightly argues, it is

important to recognise that we need the term [global governance] because government is lacking in the world of states. What we need is a conceptualisation that enables us to penetrate and understand the government-like events that occur in the world of states, even in the absence of government... Global governance is governing, without sovereign authority, relationships that transcend national frontiers. Global governance

called the 'progressive' model of global governance; 'However they originate, and at whatever pace they involve, trans-national governance mechanisms tend to be essentially forward looking.' James N. Rosenau, 'Governance in the Twenty-First Century', *Global Governance*, 1 (1995), 13–43 at 21. It is noteworthy, therefore, that Rosenau adopts a stringently anti-essentialist notion of authority.

Authority is relational; its existence can only be observed when it is both exercised and complied with. A new occupant of a position may acquire formal authority upon taking up the duties of the position, but whether his or her authority is effective and enduring depends on the response of those toward whom the authority is directed. If they are responsive, then authority can be said to be operative; if they do not respond compliantly, then the formal prerequisites of the position are quite irrelevant.

James N. Rosenau, 'Toward an Ontology for Global Governance', in *Approaches to Global Governance Theory*, ed. Martin Hewson and Timothy J. Sinclair (Albany: State University of New York Press, 1999), 287–301 at 295.

80 Finkelstein, 'What is Global Governance?', 368.

81 'The new uses of governance commonly refer to the fragmentation of political authority among governmental and nongovernmental actors at the national, regional, and global levels. They pose governance against government, which is understood as the centralisation of authority within the state.' Krahmann, 'National, Regional, and Global Governance', 323.

82 Krahmann, 'American Hegemony', 536.

83 Krahmann, 'National, Regional, and Global Governance', 323.

is doing internationally what governments do at home.⁸⁴ This definition is concerned with purposive acts, not tacit arrangements. It emphasises what is done rather than the constitutional basis for doing it. It is neutral as between the activities and their outcomes.⁸⁵

This perfectly underscores the vital nexus operating between governance and hegemony; the meaning of each term can only be constructed through the presence of the other—a consummately deconstructionist insight.⁸⁶ It is precisely because the hegemonic state is not a unitary super-state or ‘empire’,⁸⁷ relying upon leadership, legitimacy, and authority instead of conquest and coercion, that it must necessarily utilise successful strategies of global governance—‘purposive acts’—in its exercise of effective political agency. Conversely, the successful exercise of political leadership of a dominant state through governance mechanisms and practices—‘tacit arrangements’—is itself indicative of the presence of an hegemonic order. With the crystallisation of the prohibitive *ius cogens* norm against military aggression and territorial conquest following the Second World War, the United Nations era of international public order—historically parallel to the exercise of U.S. hegemony—is necessarily predicated upon the successful institutionalisation of global governance as the mechanism for both guaranteeing and regulating the exercise of hegemonic function.

84 This statement has been singled out for critique by Rosenau for bearing an obsolete statist ontology; ‘Such a formulation amply demonstrates the large extent to which we remain imprisoned by the idea that the line dividing domestic and foreign affairs still serves as the cutting edge of analysis.’ Rosenau, ‘Toward an Ontology for Global Governance’, 288. In opposition to Finkelstein, Rosenau offers an anti-statist ontology of his own; ‘Such an ontology—and the paradigms that flow from it—should recast the relevance of territoriality, treat the temporal dimensions of governance as no less important than the spatial dimensions, posit as normal shifts of authority to sub-national, trans-national, and nongovernmental levels, and highlight the porosity of boundaries at all levels of governance.’ Ibid. 288–89.

85 Finkelstein, ‘What is Global Governance?’, 368 and 369.

86 Krisch and Kingsbury have employed the term ‘global administrative space’ to conceptualise this implicit convergence between Global Governance and the para-institutionalisation of the informal inequality of States. This term denotes ‘a space in which the strict dichotomy between domestic and international law has largely broken down, in which administrative functions are performed in often complex interplay between officials and institutions at different levels, and in which regulation may be highly effective despite its predominantly non-binding form.’ As a result, ‘the sovereign equality of states is gradually undermined, and the basis of the legitimacy of international law is increasingly in doubt...Given these challenges, it is improbable that a traditional vision of international law as essentially a contractual order of equal states is even theoretically impossible.’ Nico Krisch and Benedict Kingsbury, ‘Global Governance and Global Administrative Law in the International Legal Order’, *European Journal of International Law*, 17/1 (2006), 1–13 at 13.

87 The concept of Empire within the terms of World-System Theory will be discussed in greater detail in Chapters Three and Four.

This point is worth labouring to some degree; hegemony is not incidental but vitally intrinsic to the development of the Modern World-System. Both hegemony itself, as well as the 'historical selection' of the particular hegemonic State, are organic developments, reflecting the governance requirements of the Capitalist World-Economy and its juro-political corollary, the Modern World-System. If one were to adopt the more expansive form of 'hegemonic stability theory' proposed by Gilpin⁸⁸ and Kindelberger, we would regard the successful hegemonic governance of the Capitalist World-Economy as a necessary, and, possibly, sufficient, condition for the emergence of the Modern World-System itself. According to Kindelberger, for the World-Economy to be rendered functionally operational 'there has to be a stabilizer—one stabilizer.' Under the ambitiously liberal theory of 'benign hegemony,' leadership is conceptualised as the successful production of the international 'public good of responsibility, rather than the exploitation of followers or the private good of prestige... [rendering it] a positive idea.'⁸⁹ For Kindelberger the five global economic functions of the hegemon are: (i) maintaining an open market for 'distress goods'—that is, guaranteeing freedom of trade even during periods of global depression;⁹⁰ (ii) guaranteeing counter-cyclical, or long-term, lending;⁹¹ (iii) co-ordinating trans-national macro-economic policies;⁹² (iv) enforcing a stable system of international exchange rates;⁹³ and (v) serving as a 'lender of last resort' through guaranteeing adequate capital liquidity during an economic crisis by insuring that its national currency effectively operates as a world reserve currency.⁹⁴

These functions, I believe, must be organized and carried out by a single country that assumes responsibility for the system. If this is done, and especially if the country serves as a lender of last resort in financial crisis, the [global] economic system is ordinarily

88 'If the disequilibrium in the international system is not resolved, then the system will be changed, and a new equilibrium reflecting the distribution of power will be established.' Robert Gilpin, *War & Change in World Politics* (Cambridge: Cambridge University Press, 1981), 186.

89 Charles S. Kindelberger, *The World in Depression 1929–1939*, 2nd edn (University of California Press: Los Angeles, 1986), 304. Compare Kindelberger with Nye on the 'positive idea' of liberal hegemony. For Nye, international public order constitutes a trans-historical, or 'constant,' global public good. In the 19th century, the three public goods successfully underwritten by the then hegemonic United Kingdom were: '(1) maintaining the balance of power among the major states of Europe [the core zone], (2) promoting an open international economic system [Free Trade], and (3) maintaining open international commons, such as the freedom of the seas and the suppression of piracy'. Nye, *The Paradox of American Power*, 143–44.

90 Kindelberger, *The World in Depression*, 291–2.

91 Ibid. 293.

92 Ibid. 294.

93 Ibid. 293–94.

94 Ibid. 294–95.

capable... of making adjustments to fairly serious dislocations by means of the market mechanism.⁹⁵

What is most important to realize within this ultra-liberal view is that the successful exercise of leadership by the designated State-as-Hegemon operating within the Modern World-System, in itself guarantees not only the basic viability of the World-Economy but that the global economic system remains an inherently *capitalistic* one. In the 19th and early 20th centuries, the United Kingdom

stabilized the world by the discharge of the [hegemonic] functions listed, more or less, and with the enormous help of gold standard mythology, which internalised both stable exchange rates and coordinated macroeconomic policy... Exchange rates were stable in the nineteenth century because of the gold standard. The price of gold was fixed in Britain in 1717 and in France in 1726 and maintained, with interruptions for war and crisis, until 1931 and 1928 respectively. Most economists believe that the gold standard was managed by the Bank of England, with occasional help from the Bank of France, the Bank of Hamburg, and the State Bank of Russia. The system was accepted as an objective fact, hardly subject to alteration. It was internalised and thus legitimate.⁹⁶

Note how precisely Kindelberger's macro-economic history of the modern era replicates the logic of Finkelstein's definition of governance; 'global governance is doing internationally what governments do at home,' based upon an informal, or non-institutionalised, reliance upon 'what is done rather than the constitutional basis for doing it.' This becomes even clearer if we move beyond Kindelberger's account and extend his insights into the second half of the 20th century. Following the global military victory of the Allied, or 'liberal,' powers in the Second World War, there occurred a successful 'hegemonic transition' from the United Kingdom to the United States, the latter's status as global creditor underpinning the authority of its hegemonic function within the Capitalist World-Economy. As alluded to previously, it is highly tempting to adopt a thoroughly World-System perspective in interpreting the evolution of multilateralism and the law of international organizations since 1945 as a collectively engineered effort to stabilize and legitimate the trans-Atlantic hegemonic succession.

In a more sinister light, however, it becomes equally possible to regard all major disruptions of contemporary international public order—such as the U.S.-led invasion and occupation of Iraq—in terms of systemic crises in the exercise of legitimate hegemonic function. This, in turn, leads us to confront directly what has been labelled '*the paradox of hegemony*', a recurring oscillation between multilateralist and unilateralist approaches to global governance on the part of the hegemon, which is itself a by-product of the constant, but ordinarily manageable, conflict between the State-as-Hegemon's designated international role and its particularistic self-interest. Cronin has usefully identified a 'role strain' inherent

95 Ibid. 289.

96 Ibid. 293.

within hegemonic agency: this 'oscillation between unilateralism and multilateralism places a great strain on hegemonic order and forces the hegemon to expand its resources in trying to maintain the essential rules of the system.'⁹⁷ There exists a latent and ineradicable

tension between a dominant state's role as hegemon (defined in terms of leadership) and its role as a great power (defined in terms of material capabilities). These roles often call for contradictory performances. While secondary states expect [the hegemon] to often act on behalf of the common good (as defined by the politically relevant powers), domestic political actors expect the latter to act in pursuit of parochial interest. Thus there is a contradiction between the propensity for a powerful state to take unilateral action in promoting its self-defined interest and its desire to maintain long-term systemic stability at a minimal cost.⁹⁸ This tension explains the contradictory behaviour that hegemons often exhibit.⁹⁹

In order to minimise the element of unpredictability brought to global governance by hegemonic 'role strain,' the World-System requires hegemonic leadership to act in a parallel manner, functioning as a form of 'international socialization,' with each type of state internalising a particular set of norms and expectations based

97 Bruce Cronin, 'The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations,' *European Journal of International Relations*, 7/1 (201), 103–30 at 104. The relevance of these considerations to the political turmoil regarding the Security Council debate over S.C. Resolution 1441 are obvious and do not require further elucidation.

98 On the extended implications of this point, compare Cronin with Krahmann; 'Governance norms, too, appear to favour the trend away from the state in favour of limited national sovereignty, self-government and the marketization of social relations.' Krahmann, 'American Hegemony', 536.

99 Cronin, 'The Paradox of Hegemony', 104–5. Anderson has expressed a similar insight in more expressly dialectical terms.

[The] hegemon must—can only—be a *particular* state: as such, inevitably possessed of a differential history and set of national peculiarities that distinguish it from all others. This contradiction is inscribed from the beginning, in Hegel's philosophy, in which the necessity of the incarnation of reason in just *one* world-historical state, in any given period, can never entirely erase the contingent multiplicity of political forms around it. Latently, the singular universal always remains at variance with the empirical manifold. This is the conceptual setting in which American 'exceptionalism' should be viewed. All states are more or less exceptional, in the sense that they possess unique characteristics. By definition, however, a hegemon will possess features that *cannot* be shared by others, since it is precisely those that lift it above the ranks of its rivals. But at the same time, its role requires it to be as close to a generalizable—that is, reproducible—model as possible. Squaring this circle is, of course, in the end impossible, which is why there is an inherent coefficient of friction in any hegemonic order. Structurally, a discrepancy is built into the harmony whose function it is to install... The particular and the general are condemned to each other. Union can only be realized by division.

Perry Anderson, 'Force and Consent,' *New Left Review*, 17 (2002), 5–30 at 21.

upon its relative integrated position within the international society.¹⁰⁰ When hegemonic function operates effectively, international socialization occurs as a matter of course.

It comes about primarily in the wake of the conscious exercise of power. That is, socialization is distinct from, but does not occur independently of, power manifest as the manipulation of material incentives. Material inducement triggers the socialization process, but socialization nevertheless leads to outcomes that are not explicable simply in terms of the exercise of coercive power.¹⁰¹

The global socialization process induced by hegemonic power creates a framework for the normativity of international public order, yielding sets of convergences among States concerning standards and consistency conduct and expectations.¹⁰² What is essential is the legitimation of a hierarchical ordering among State actors. Since normativity is the product of the exercise of leadership function, then the resultant order must of necessity not only be legitimate but inherently unequal as well—a striking confirmation of Foucault's arguments that power is the real source of value.

But there is a more subtle component of hegemonic power, one that works at the level of substantive beliefs rather than material benefits. Acquiescence is the result of the socialization of leaders in secondary nations. Elites in secondary states buy into and internalise norms that are articulated by the hegemon and therefore pursue policies consistent with the hegemon's notion of international order. The exercise of power—and hence the mechanism through which compliance is achieved—involves the projection by the hegemon of a set of norms and their embrace by leaders in other nations.¹⁰³

100 'With regard to interests... the shift from government to governance can be found in the growing acceptance of the heterogenous and sometimes conflicting nature of interests and the aim to ensure that each actor can perceive them as uninhibited by external regulation as possible.' Krahmann, 'American Hegemony', 536.

101 G. John Ikenberry and Charles A. Kupchan, 'Socialization and Hegemonic Power', *International Organization*, 44/3 (1990), 283–315 at 284.

102 Interestingly, Ikenberry and Kupchan view hegemonic socialisation as a systemic response to episodic global dysfunction; socialisation

occurs primarily after wars and political crises, periods marked by international turmoil and restructuring as well as fragmentation of ruling coalitions and legitimacy crises at the domestic level. The simultaneity of international and domestic instability creates the conditions conducive to socialization. At the international level, the emerging hegemon articulates a set of normative principles in order to facilitate the construction of an order conducive to its interests. At the domestic level, crisis creates an environment in which elites seek alternatives to existing norms that have been discredited by events and in which new norms offer opportunities for political gains and coalitional realignment.

Ibid. 284. A similar argument from the perspective of World-Systems Analysis will be offered in Chapter Three.

103 Ibid. 283.

A sort of feedback loop is created; to the degree that normativity is achieved via hegemonic socialization, such socialization becomes increasingly less coercive over time as the substantive content of hegemonic leadership is internalised as normativity.

Although socialization is triggered by coercion and material inducements, the process of socialization can lead to outcomes that are not explicable simply in terms of the exercise of coercive power. Socialization affects the nature, the costs and the longevity of the interactions that shape hegemonic systems. In particular, socialization leads to the legitimization of hegemonic power in a way that allows international order to be maintained without the constant threat of coercion.¹⁰⁴

From the perspective of the practical requirements of hegemony, the successful bridging of the Is/Ought dichotomy becomes a question of ideology, yielding what some theorists have identified as 'the new sovereignty'; to be integrated into the World-System as a 'true' State—that is, as the lawful bearer of international legal personality—the State must internalise fully the normative framework of hegemonic socialization. Simply put, the 'Is' (hegemony) will become the 'Ought' ('the new sovereignty') over time through repetitive socialization and internalisation; the successful resolution of a transcendental dilemma by means of a mimetic secularity. The vital centre to this entire process of trans-national legitimation is the complex of relationships that have been established between hegemony, hegemonic socialization, and the successful universal propagation of an array of operationally effective norms and values—a 'regime'.¹⁰⁵ As all normative discourse is ultimately normalizing, the ideological legitimization of hegemonic leadership through a worldwide convergence of norms allows us to re-formulate the question of the nature, if not the actual existence, of International Law in the most interesting manner possible—which is to say, in the most *political* manner possible. The analytical and the normative components of the discourse of governance are neither neutral nor pluralist; global governance is the sign Globalisation,¹⁰⁶

104 Ibid. 315. Once again, cost-benefit analysis is central to hegemonic theory.

The socialization of elites into the hegemonic order leads to a consolidation of hegemonic power; rule based on might is enhanced by rule based on right. Furthermore, it is less costly: the hegemon can expand fewer economic and military resources to secure acquiescence because there is a more fundamental correspondence of values and interests.

Ibid. 286.

105 Karl Dingwerth and Philipp Pattberg, 'Global Governance as a Perspective on World Politics', *Global Governance*, 12/2 (2006), 185–204 at 187:

The most fundamental observation we make when [contemplate global governance]... is not the existence of specific actors (e.g., states) but the existence of norms, rules, and standards that structure and constrain social activity... Ultimately, a theory of global governance would thus differ from a theory of international politics. Its central unit of analysis would be the conditions for social activity (e.g., norms and rules) rather than actors and relations between them.

106 Ulrich Brand, 'Order and Regulation: Global Governance as a Hegemonic Discourse of International Politics', *Review of International Political Economy*, 12/1 (2005), 155–76 at 160:

which, in turn, signifies the internationalisation of specifically neo-Liberal forms of economic theory and praxis.¹⁰⁷ Alterations of governance and globalisation discourse within the trans-national plane necessarily parallel equivalent discursive shifts within the national realm. Concurrent with the proliferation of global governance theory during the 1990s, a

strengthening of the dominant classes *vis-à-vis* wage earners took place, in which financial capital won hegemony within the [Developed World] power bloc. A harsh critique of the state contributed to the legitimising of market and private interests in areas which had previously been essentially in public hands. This de-legitimised especially welfare services as well as corrective state interventions in the accumulation process... It is important to note that the neoliberal projects were until now a fundamental part of the emerging post-Fordism, i.e. the pushing back of specific state functions, the commodification of social relations and the strengthening of certain social forces, especially internationally oriented factions of capital.¹⁰⁸

The occupation and subsequent 'capture' of trans-national space by private and semi-private bodies, most notably the now infamous Non-Governmental Organisations (NGOs), effected a wholesale substitution of the global 'general' interest with the particular interests of the dominant States within the World-System, all of which are capitalist and all of which became increasingly neo-Liberal. As a result, neo-Liberal preferences become 'locked-in' and 'normalised' through the hegemonic enforcement of these selfsame norms and values, now elevated to the level of an apparently self-grounding political consensus.¹⁰⁹ The more ambitious proponents of 'the new sovereignty', such as Slaughter, regard it as the key to the

A double perspective prevails of understanding Global Governance as a process which politically pushes international relations in a desirable direction, namely that of a process of international competition and economic growth which is as crisis-free as possible, and (b) by means of which the 'negative consequences of globalisation' are dealt with... To reduce it to the lowest common denominator, 'Global Governance' means politically accompanying the process of globalisation

—an inherently market-driven phenomenon.

107 'The economic is conceived as the core process of globalisation and precisely because of this as being in its core not [an] object of political regulation.' Ibid. 165.

108 Ibid. 162.

109 Overbeek, 'Global Governance, Class, Hegemony,' 10–11. 'Cross-border commercial arbitration and credit-rating services constitute informal regimes that are already substantially Americanised; while the point of the 'new financial architecture' is to make each nation's accounting and bankruptcy laws into facsimiles of the American [model]. Panitch, 'The New Imperial State,' 15–16. On the indispensability of neo-Liberalism to the continuation of American hegemony, see Panitch and Gindin, 'Global Capitalism and American Empire,' 18–23. The liberalisation of cosmopolitan finance provided the answer as to 'how tensions and instabilities would be managed in a world in which the American state was not omnipotent but rather depended, for its rule [leadership?], on working through other states.' Ibid. 20.

solution of the paradoxes of hegemonic leadership. Failure to socialize fully yields an inferior or 'second-tier' form of sovereignty, rendering the deviating State fully subject to the lawful, and desirable, interventions of the hegemon.

A major advantage of inducing compliance with norms of good governance through selective admission and discipline of individual members of government networks is the ability to target specific government institutions either for reform or reinforcement, regardless of how their fellow government institutions are behaving. The exercise of such targeted power holds the possibility of helping transitional states stabilize and democratise¹¹⁰ by offering inducements and applying pressure to some of their institutions, such as particular regulatory agencies or the executive, while bolstering others, like the courts. It avoids the pernicious problem of labelling an entire state 'liberal' or 'illiberal', 'democratic' or 'undemocratic', or even 'rogue' or 'pariah'. Many citizens comprise a state and many institutions a government. All desire inclusion and dislike exclusion, and each can be individually subject to this power as circumstances warrant.¹¹¹

Slaughter's unabashed and largely un-self-reflective enthusiasm for 'the new sovereignty' is enlightening in several respects. Firstly, it clearly establishes the necessary connection between hegemony and governance; hegemonic socialization is tantamount to 'good governance' and this quantum of goodness can only be secured through the normatively correct form of coercive intervention¹¹²—in Slaughter's telling phraseology, 'selective admission and discipline'. Secondly, consistent with global governance's de-centralization of political authority via geographical fragmentation, Slaughter formulates a model for micro-level analysis and targeted prescriptions. The entire State, which is no longer assumed to constitute a monistic unity, does not need to be 'disciplined' in its entirety, but merely some recalcitrant or insufficiently socialized fragment of it. What this approach completely elides, however, is the problem of unlimited hegemonic prescription; by fracturing the State on the requisite basis of global governance a plethora of socialization norms and principles are created, the radical proliferation of which reduces the quanta of certainty and authority that hegemonic leadership is supposed to provide. Thirdly, and most importantly, Slaughter affirms, in remarkably naked terms, the complete absence of contradiction between hegemonic socialization and the formal juridical inequality of States. The deeper paradox here is that for a State to meet the criteria of the 'new sovereignty' it must, in some

110 Slaughter appears to identify democracy with stability.

111 Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order', *Stanford Journal of International Law*, 40 (2004), 283–327 at 318.

112 All the more so when such a connection is expressly denied. 'Even if questions of hegemony are largely ignored or allowed to disappear in the concept of "general interest", the Global Governance discourse is in fact part of the disputes over hegemony, the latter understood as a contradictory process in which—embedded in material conditions—specific viewpoints and interests are generalized.' Brand, 'Order and Regulation', 171.

sense, politically *weaken* itself so as to facilitate the untrammelled penetration of its national economy by the Capitalist World-Economy, now predicated upon the corporate governance of multi-national companies and the vicissitudes of cosmopolitan finance.¹¹³ Socialization serves as a taxonomy or classification scheme operating within the World-System and assigning all of the member States a particular kind of international legal identity. Yet the fundamental dilemma remains—the systematic integration of the State into the contemporary Capitalist World-Economy entails its political perforation; the shift towards cosmopolitan finance Capitalism during the US-led phase of Globalisation beginning in the 1980s temporally corresponds to the emergence of the disaggregated ‘Juridical State’ throughout the Developing World, particularly in sub-Saharan Africa.¹¹⁴

The ‘new sovereignty’ is the capacity to participate in the international and trans-national regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one another what they could once only hope to accomplish acting alone within a defined territory. This participation is conditioned, in the sense that it mandates acceptance of certain basic responsibilities required of all governments towards their own people.¹¹⁵

As should be obvious by now, the key to successful hegemonic socialization is the international rule of law;¹¹⁶ in truth, the functional operation of International Law within hegemonic global governance may provide the single most persuasive explanation for the existence of international jurisprudence itself¹¹⁷—although such an existence is both materially and ideologically contingent; the ‘historical record shows that it can be convenient for the hegemon to have a body of law to work with provided that it is suitably adapted. Moreover, those subject to its

113 For an elaboration of both of these key attributes of the contemporary World-Economy, see below, Chapters Three and Four.

114 See below, Chapter Seven.

115 Ibid. 285.

116 Chandler has compellingly reduced the entirety of contemporary International Law—particularly in its most obviously Liberal form, the ultimate canard of ‘humanitarian intervention’—to the practical exercise and requirements of hegemonic leadership. This leads directly to his paradoxical assertion that the ‘extension of “international justice” is, in short, the abolition of international law.’ David Chandler, ‘International Justice’, *New Left Review*, 6 (2000), 55–66 at 63.

117 Koskeniemi and Leino have made a similar suggestion, although more in terms of the professional development of International Law as established judicial practice. ‘International law and institutions are the product of a professional ethos that has since the end of the 19th century sought to explain how an apparently “anarchic” aggregate of self-regarding sovereigns could still be united as “order” at some deeper level of existence, either as philosophical principle or sociological generalisation.’ Martti Koskeniemi and Paivi Leino, ‘Fragmentation of International Law? Post-modern Anxieties’, *Leiden Journal of International Law*, 15 (2002), 553–79 at 556. No violence is done to the author’s Text by inserting ‘hegemony’ in place of the ineffable ‘order’.

domination may need clear indications of what is expected of them.¹¹⁸ The presence of Law itself signifies legality and, therefore, legitimacy. Valid, or 'true', hegemonic leadership is never imposed because it operates the governance machinery of the World-System that yields international norms and rules that both reflect and compel their internalisation by the State actors themselves. This symbiotic process is best exemplified by the crystallisation of international legal custom.

Nevertheless, the 'role strain' identified by Cronin is never fully suspended by international legality; at best, it is merely temporarily displaced. For the recurrent struggle between the hegemon's international obligations and parochial self-interest can now be played out through the international legal arena of interpretation and enforcement. What we witness is the transference of the contradictory impulses of Hegemony from the realm of the political to the realm of the juridical; 'After all, the hegemon can only do so much on its own. But when acting with the [United Nations Security] Council, the hegemon can do almost anything, while still appearing to be acting consistently with the [United Nations] Charter's vague principles and purposes.'¹¹⁹ It is tempting to label this fruitful, or creative, tension at the heart of International Law 'constructive indeterminacy'. International Law—or, more precisely, hegemonic International Law—is 'constructive' precisely because it enables hegemonic governance to function; it is 'indeterminate' because it has to be selectively interpreted and applied by the hegemon while executing its hegemonic role within the World-System. Alvarez brings the subtle permutations of constructive indeterminacy to light in his exemplary discussion of the Security Council debates over Resolutions 687 and 1443, those governing the legality of the United States' intervention against and occupation of Iraq.

The resolutions addressed here [are not] manifestly illegitimate in a political sense; all were adopted unanimously or nearly so. As with the imperialist bilateral treaties of another era, if these actions pose risk of hegemonic abuse or are the product of hegemonic power, it is not because, at least in these instances, the hegemon is violating existing law but because, like more common examples of [hegemonic International Law], these Council actions meld hegemonic power with the law. [Hegemonic International Law] results from the privileged position accorded to the hegemon under the existing rules and institutions of international law.¹²⁰

The juridical and rhetorical struggles over the U.S.-led invasion of Iraq presents us with the unparalleled spectacle of the hegemon legally defecting from the very

118 Detlev F. Vagts, 'Hegemonic International Law', *The American Journal of International Law*, 95/4 (2001), 843-8 at 845.

119 Jose E. Alvarez, 'Hegemonic International Law Revisited', *The American Journal of International Law*, 97/4 (2003), 873-88 at 887. On the centrality of hegemonic domination within the practical operation of the United Nations regime, see Maurice Bertrand, 'The UN as an Organization: A Critique of its Functioning', *European Journal of International Law*, 6 (1995), 349-59, *passim*.

120 Ibid.

system that it has created for the purpose of giving unilateral enforcement to its own executive decision. Tellingly, the United States has so far succeeded.

V The Grotian Heritage and 'Liberal Millenarianism'

At least as problematic as its implication with hegemonic International Law is the Grotian Heritage's inherent compatibility with both of two otherwise irreconcilable 'paradigms' of International Relations Theory: the Hobbesian/Realist model, and the Kantian/Liberal model. This apparent paradox is completely consistent with the central critical shortcoming of mainstream International Relations scholarship: the absence of a sophisticated theory of Political Economy. As a result, both paradigms replicate the de-historicising 'amnesia' induced within International Law by means of the Grotian Heritage.¹²¹ Realism, through its prioritising of individualist 'Self-Help', necessarily functionalises and, therefore, legitimates (even if passively) the use of 'armed force'; that is, state-sanctioned organized violence.¹²² Liberalism, although apparently more benign in its supra-national cosmopolitanism, institutionalises current asymmetrical levels of international economic development. However, just as Capitalism assumes a 'natural' and politically unambiguous 'grounds of attraction' for social actors, Liberalism

- 121 Outi Korhonen, 'Liberalism and International Law: A Centre Projecting a Periphery,' *Nordic Journal of International Law*, 65 (1996), 481–532 at 523.

The tracking of the genealogy of Liberal thought suggests that it has been influential in the development of international law, of both the practice and the theoretical accounts. To legitimise a claim of the centre of [a] new international order, Liberalism tries to free itself from the past debts. It seeks to contrast itself to early liberal traditions that are passé and to events that are unfavourable such as war and colonialism. It is a liberalism of Liberal Peace, unfamiliar and unrelated to that liberalism which preceded and, for a large part, incited the head-over-heels rush to unscrupulous colonization and industrialization in the 19th century. It also seeks a contrasts [sic] to the errors and shortcomings of the international legal predictions, explanations, and interpretations of the past.

For additional examples of the de-politicising 'self-forgetfulness' of International Law, See Kennedy, 'The Disciplines of International Law and Policy', 68 and 99–101.

- 122 Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics', 314:

The characteristic feature of modern realism is its use of the concept of power to explain the course of international politics. The primary unit of analysis is the State which is regarded as operating in an anarchical system dominated by conflict...Realism aligns international law with power in so far as international law is considered a tool at the disposal of the most powerful.

Accordingly, 'International Law cannot, by its own terms and as a matter of political reality, prescribe rules of conduct except in a very limited sense. Its prescriptive effect is entirely dependent on the accuracy of the codification of State practice.' J. S. Watson, 'A Realistic Jurisprudence of International Law', in Koskeniemi (ed.), *International Law*, 3–24 at 5.

assumes transparency in the production and distribution of international legal norms.

This is most evident in the current rise of 'Liberal Millenarianism',¹²³ the movement by third-generation New Haven scholars to resurrect a de facto two-tier international public order, divided between the First World domain of 'the Law-zone' and the Third World domain of 'failed' or 'suspect' states. The concurrent academic trend towards the 'legalization' of world politics¹²⁴ is underscored by the widespread revival of interest in both Kantian juro-political theory¹²⁵ and the

123 Myres S. McDougal and W. Michael Reisman, 'International Law in Policy-Oriented Perspective', in Ronald St. John MacDonald (ed.), *Essays in Honour of Wang Tiewa* (Dordrecht: Martinus Nijhoff, 1994), 103–29, *passim*; John Norton Moore, 'Prolegomenon to the Jurisprudence of Myres McDougal and Harold Laswell', *Virginia Law Review*, 54 (1968), 662–88, *passim*; John G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', *International Organization*, 36/2 (1982), 379–415, *passim*; John G. Ruggie, 'At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy', *Millennium*, 24/3 (1995), 507–26, *passim*; Ann-Marie Slaughter, 'International Law and International Relations Theory: A Dual Agenda', *American Journal of International Law*, 87 (1993), 205–39, *passim*; Ann-Marie Slaughter, 'A Liberal Theory of International Law', *American Society of International Law Proceedings*, June 2000, 240–53, *passim*; Ann-Marie Slaughter, 'The Real New World Order', *Foreign Affairs*, 76 (Sept–Oct 1997), 183–205, *passim*; Ann-Marie Slaughter, Andrew S. Tulemelo and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', *American Journal of International Law*, 92 (1998), 367–97, *passim*. For a critique, See Korhonen, 'Liberalism and International Law: A Centre Projecting a Periphery', *passim*, and Gerry Simpson, 'Two Liberalisms', *European Journal of International Law*, 12/3 (2001), 537–71, *passim*.

124 Judith Goldstein et al., 'Introduction: Legalization and World Politics', *International Organization*, 54/3 (2000), 385–99, *passim*.

125 Michael J. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, Part I', *Philosophy and Public Affairs*, 12/3 (1983), 205–35, *passim*; Michael J. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, Part II', *Philosophy and Public Affairs*, 12/4 (1983), 323–53, *passim*; Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 86 (1992), 46–91, *passim*; Gregory H. Fox and Brad D. Roth, 'Introduction: The Spread of Liberal Democracy and its Implications for International Law', in Gregory H. Fox and Brad D. Roth (eds), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), 1–22, *passim*; Gregory H. Fox, 'The Right to Political Participation in International Law', *Yale Journal of International Law*, 17 (1992), 540–607, *passim*; W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', in Fox and Roth (eds), *Democratic Governance and International Law*, 239–58, *passim*; Gregory H. Fox and George Nolte, 'Intolerant Democracies', in Fox and Roth (eds), *Democratic Governance and International Law*, 389–435, *passim*. For critique, see Susan Marks,

neo-Kantian 'Democratic Peace' thesis,¹²⁶ both presupposing a Liberal-derived 'deep normative order'¹²⁷ that serves as a perfect analogy for the Naturalist principle of *recta ratio*.

Significantly, contemporary international legal scholarship evidences an overwhelming preference for Liberal International Relations theory, a superimposing of public law municipal governance upon global space.

The most distinctive aspect of liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States, based on their domestic political structure and ideology... the resulting behavioural distinctions between liberal democracies and other kinds of States, or more generally between liberal and non-liberal States, cannot be accommodated within the framework of classical international law.¹²⁸

'International Law, Democracy and the End of History', in Fox and Roth (eds), *Democratic Governance and International Law*, 532–66, *passim*.

The proposition that there is an international or universal norm of 'democracy'...[is] always suspect as a neo-colonialist strategy. It is too easily used against revolutionary politics that aim at the roots of the existing distributionary system, and it domesticates cultural and political specificity in an overall (Western) culture of moral agnosticism and rule by the market.

Martti Koskeniemi, 'Whose Intolerance, Which Democracy?', in Fox and Roth (eds.), *Democratic Governance and International Law*, 163–9 at 163–4.

Note how this criticism neatly recapitulates Wallerstein's argument concerning the bourgeois appropriation of revolutionary transformation via the geo-cultural deployment of Liberalism. Wallerstein, *Unthinking Social Science*, 15–17. 'The claim that non-liberal states somehow do not participate in the zone of law denies the universalism of international law and effectively condones the confinement of non-liberal states to a realist world of power politics'; that is, to neo-colonialist intervention by the 'Law zone' States. Harold Hongju Koh, 'Why Do Nations Obey International Law?', *Yale Law Journal*, 106 (1977), 2599–2659 at 2650.

- 126 Michael J. Doyle, 'Liberalism and World Politics', *American Political Science Review*, 80/4 (1986), 1151–69, *passim*; John M. Owen, 'How Liberalism Produces Democratic Peace', *International Security*, 19/2 (1994), 87–125, *passim*. For critique, See Layne, 'Kant or Cant: The Myth of the Democratic Peace', *International Security*, 19/2, 5–49, *passim*; Patrick Capps, 'The Kantian Project in Modern International Legal Theory', *European Journal of International Law*, 12/5 (2001), 1003–25, *passim*; David E. Spiro, 'The Insignificance of the Liberal Peace', *International Security*, 19/2 (1994), 50–86, *passim*. See also, Christian Reus-Smit, 'The Strange Death of Liberal International Theory', *European Journal of International Law*, 12/3 (2001), 573–94, *passim*.

- 127 Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', 151–2.

- 128 Slaughter, 'International Law and International Relations Theory: A Dual Agenda', 504. See Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 483–4: 'This is an American crusade... a deformed conception of law, and the political enthusiasm about the spread of 'liberalism', constitutes an academic project that can-

Now it is the self-evident inadequacies of the traditional legal taxonomies themselves that serve as the ideological legitimization of a two-tier international order.

A Liberal analysis of international law offers a new positive ontology to fit this new normative agenda. From the Liberal perspective, state behaviour is best analysed as a function of domestic and trans-national behavioural patterns for which liberal and non-liberal states serve as an excellent proxy. To the extent that positive behavioural differences can be identified on the basis of this division, they will reinforce the intelligibility and utility of a normative distinction. Conversely, a norm of democratic governance helps to justify the positive Liberal distinction between liberal and non-liberal states.¹²⁹

This shift from classical to contemporary international legal discourse is logically premised upon a rhetorical conflation of Liberalism with Natural Law, which ultimately stands revealed as a discursive expression of hegemony.

By rejecting legal positivism, with its concern to limit the scope of international law to those standards agreed to by sovereign states to bind them, the policy-oriented perspective in international law facilitates an equation of international law with whatever norms are of value to dominant states. By deeming the process through which norms and institutions are agreed to be as much law as the resultant norms and institutions themselves, and by equating political and economic power with legitimate rule-making authority, the policy-oriented school of international law provides a ready-made justification for defiance of established international norms and procedures by powerful countries. After all, if rules and institutions established by consent are no more than is the process of interstate power-brokering and influence, then rules and institutions can freely be ignored when they fail to serve the interests of hegemonic states.¹³⁰ *The policy-oriented school of international law has thus spawned a new version of natural law thinking under which the wills of powerful states are simply substituted for that of God or Nature.*¹³¹

What is at issue here is the radical politicisation of legal discourse of the seemingly most a-political kind—Naturalism. Richardson has forcibly argued that

not but buttress the justification of American hegemony in the world.' Compare this with Alvarez, who argues for the linkage between Liberal Millenarianism and 'the Washington consensus.' Jose E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', *European Journal of International Law*, 12 (2002), 189–91.

129 Slaughter, 'International Law and International Relations Theory: A Dual Agenda', 238.

130 Compare Hathaway with Vagts on precisely this point; 'The hegemon can pronounce as customary law those portions of such a convention that suits its interests while ignoring the rest.' Vagts, 'Hegemonic International Law', 846.

131 James C. Hathaway, 'America, Defender of Democratic Legitimacy?', *European Journal of International Law*, 11 (2000), 121–34 at 129. Emphasis added.

any form of international Liberalism, ideologically and rhetorically coupled to a positivist jurisprudence and a territorial notion of sovereignty, elides critical opposition through its self-validating confirmation of the inherent 'correctness of maximum sovereign discretion.'¹³² By contrast, Naturalist jurisprudence

For all its conceptual ambiguities, underpins much of the legal discourse of human rights, formerly was the primary foundation of international law, and still retains visible residual authority in modern international law, and does at least provide one such outside standpoint... under which to assess the rectitude of the actions of either the superpower State or of any coordinated group of States acting against other States.¹³³

As Habermas has recently pointed out, the parallel (re-)emergence of Hegemony in academic discourse and the collapse of Liberalism into hegemonic function constitutes the single most pressing conceptual and normative challenge to international legal scholarship today; 'the crucial issue of dissent is whether justification through international law can, and should, be replaced by the unilateral, world-ordering politics of a self-appointed hegemon.'¹³⁴ It is important to note, however, that in this passage Habermas appears to be implicitly identifying Hegemony with Empire, either 'formal' or 'informal'; as was pointed out above, a 'true' hegemon can never be 'self-appointed.' However, Habermas' insight remains relevant if we understand in terms of the 'paradox of hegemony,' which pushes the hegemon in the direction of unilateralist imperialistic action. Indeed, such a radical collapse of ontological distinction, lies at the very heart of the hegemonic paradox; within this discursive re-formulation the extra-legal performance of hegemonic function is itself constitutive of international public order. From this flows the 'revolutionary' logic of the neo-conservative, or 'neo-con,' strategy: if 'the regime of international law fails, then the hegemonic imposition of a global liberal order is justified, even by means that are hostile to international law.'¹³⁵

The capture of a potentially oppositional discourse such as Natural Law by hegemonic power transforms the discourse into a site of contending textual interpretation and, by implication, of political struggle. Of course, one possible line of approach here is to deny the relevance of Natural Law altogether and to focus exclusively on those aspects of positive International Law that can be pressed into the service of a progressive agenda. This, however, proves a barren strategy. As we have already demonstrated, the lurking presence of Natural Law is a

132 Richardson, 'U.S. Hegemony', 40. The inability of Positivism to act as the self-grounding foundation of an internally coherent normative international order will be discussed at greater length in the next chapter in relation to the work of Martti Koskeniemi.

133 Ibid.

134 Jürgen Habermas, 'Interpreting the Fall of a Monument', in Amy Bartholomew (ed.), *Empire's Law: The American Imperial Project and the 'War to Remake the World'* (London: Pluto Press, 2006), 44-51 at 49.

135 Ibid. 45.

constitutive element of the very existence of International Law, investing it with both coherence and authority. Not only would such a manoeuvre do intellectual violence to any sophisticated understanding of International Law, but it would ultimately prove itself counter-productive; it would result in the unacceptable political danger of an unconditional reliance upon the positively expressed will of certain States in certain situation as constituting the exhaustive substantive scope of International Law. Not only has it historically proven extraordinarily difficult to conclusively reconstruct the definitive legal opinion of any State on the basis of positive expression alone, it also makes International Law intolerably vulnerable to the particular will of such States, a risky gambit given the lingering presence of sovereignty, territoriality, and unilateralism—all of which have been on prominent display during the intervention(s) against Baghdad.¹³⁶

Perhaps most importantly, such a myopic Positivism unfairly marginalizes both the subversive and oppositional potential of Natural Law. As the sub-textual ontological conflation of Naturalism with hegemonic 'Liberal Millenarianism' demonstrates, juridical and transcendental meanings are inherently reversible, or *iterable*, straddling entire sets of antinomies and appositional terms. It is precisely this subversive—and self-subverting—potential of Naturalism that requires an analytical approach grounded upon a rhetorical stratagem of *irony*; that is to say, Deconstruction. The deconstruction of the Grotian Heritage and the Naturalism that infuses it will highlight the iterability of international legal norms and meanings, subverting what we might name the 'politicisation of Being' that lies at the very heart of the normative foundations of the Modern World-System.

136 'In the Middle East, in Africa and the Balkans, the exercise of "international justice" signifies a return to the Westphalian system of great power domination over states which are too weak to prevent external claims against them.' Chandler, 'International Justice', 66.

Chapter Two

'The Force of Law': Critical Legal Studies and Deconstruction

United in their opposition to the a-historicising and de-politicisation of International Law, critical international legal scholars have formed themselves into a number of divergent camps: Feminist,¹ Critical Race Theory,² and Post-Colonialism.³ Utilising Unger's taxonomy,⁴ International Law is classified (stigma-

1 Karen Knopp, 'Re/Statements: Feminism and State Sovereignty in International Law', *Transnational Law & Contemporary Problems*, 3 (1993), 294–344, *passim*; Hilary Charlesworth, 'Feminist Methods in International Law', *American Journal of International Law*, 93 (1999), 379–94, *passim*; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', *American Journal of International Law*, 85 (1991), 613–45, *passim*.

2 See below, Chapter Eight.

3 Nathaniel Berman, 'In the Wake of Empire', *American University International Law Review*, 14 (1998–99), 1521–71, *passim*.

4 Roberto Mangabeira Unger, 'The Critical Legal Studies Movement', *Harvard Law Review*, 96 (1983), 561–675 at 564 and 565. Post-Colonialism, like the broader category of Critical Theory, is a nebulous concept that eludes precise definition. It broadly operates within the terms of Gramscian neo-Marxism in that it contests not only the material but also the cultural and ideological practices of dominant and exploitative hegemonic 'groups' or 'blocs'. For Young, Post-Colonialism consists of a critique of contemporary power structures combined

with an interventionist methodology developed for the analysis of the subjective and material conditions of the [contemporary] postcolonial era articulated with active transformative practices. Postcolonialism therefore designates the perspective of... theories which analyse the material and epistemological conditions of postcoloniality and seek to combat the continuing, often covert, operation of an imperialist system of economic, political and cultural domination. The global situation of social injustice demands postcolonial technique—from the position of its victims, not its perpetrators... Its popular attraction derives from the way in which postcolonialism gives equal weight to outward historical circumstances and to the ways in which those circumstances are experienced by postcolonial subjects.

Robert J.C. Young, *Postcolonialism: An Historical Introduction* (Oxford: Blackwell, 2001), 58. Post-Colonialism's emphasis upon both subjectivity and epistemology, as well as the deployment of the ubiquitous prefix 'post' naturally invites comparison

tised?) as ‘the legal system that engendered colonialism,’⁵ expressed both through Formalism⁶ (*opinio iuris*; custom; the formal versus the substantive equality of States) and Objectivism (the Mandate system;⁷ International Financial Institu-

with other similarly themed forms of contemporary Critical Theory, such as Post-Structuralism and Post-Modernism.

The term ‘post-colonial’ would be more precise... if articulated as ‘post-First World Theory’, or ‘post-anticolonial technique’, as a movement beyond a relatively binaristic, fixed and stable mapping of power relations between ‘colonizer/colonized’ and ‘centre/periphery’. Such rearticulations suggest a more nuanced discourse, which allows for movement, mobility and fluidity. Here, the prefix ‘post’ would make sense less as ‘after’ than as a following, going beyond and commenting upon a certain intellectual movement—third world anti-colonialist technique—rather than beyond a certain point in history—colonialism; for here ‘neo-colonialism’ would be a less precise form of addressing the situation of neo-colonized countries, and a politically more active mode of engagement.

Ella Shohat, ‘Notes on the “Post-Colonial”’, *Social Text*, 31–32 (1992), 99–113 at 108.

- 5 Siba N’zatioula Grovogui, *Sovereigns, Quasi-Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996), 3.
- 6 Anthony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century Law’, in id., *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 32–114, *passim*; Yasuaki Onuma, ‘Eurocentrism in the History of International Law’, in id. (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 371–86, *passim*; James Thuo Gathii, ‘International Law and Eurocentricity’, *European Journal of International Law*, 9/1 (1998), 184–239, *passim*; Georges Abi-Saab, ‘International Law and the International Community: The Long Road to Universality’, in Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers, 1994), 31–41, *passim*; R. P. Anand, ‘Attitude of the Asian-Pacific States Toward Certain Problems of International Law’, *International And Comparative Law Quarterly*, 15 (1966), 55–75, *passim*; Dianne Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’, *Social and Legal Studies*, 5/3 (1996), 337–64, *passim*; Obiara Chinedu Okafor, ‘After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood’, *Harvard International Law Journal*, 41/2 (2000), 503–28, *passim*; Makua wa Mutua, ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’, *Michigan Journal of International Law*, 16 (1995), 1113–64, *passim*; Benedict Kingsbury, ‘Confronting Difference: the Puzzling Durability of Gentili’s Combination of Pluralism and Normative Judgement’, *American Journal of International Law*, 92 (1998), 713–23, *passim*.
- 7 Anthony Anghie, ‘The Heart of My Home: Colonialism, Environmental Damage, and the Naura Case’, *Harvard International Law Journal*, 34/2 (1993), 445–506, *passim*; Anthony Anghie, ‘Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations’, *New York University Journal of International Law and Politics*, 2002, 513–607, *passim*; Ruth Gordon, ‘Saving Failed States: Sometimes a Neocolonialist Notion’, *American University Journal of International Law and Policy*, 12/6 (1997), 904–97, *passim*; Ganeshwar Chand,

tions;⁸ SAPs⁹). This colonialist sub-text is not merely a pragmatic device of European imperialism, but a necessary attribute of contemporary International Law: an attempt to positively ground the foundational concept of sovereignty upon a hierarchy of 'objective' social criteria (Civilisation; Development; Democracy) in order to thwart the Austinian critique of the allegedly un-scientific premises of international jurisprudence, 'law improperly so-called.'¹⁰ The central issue that separates these camps, however, is the problematic relationship between the linguistically derived methodology of CLS, or the 'New Stream', and the practical strategies of political emancipation.¹¹

I argue that the most appropriate methodology to give expressive shape to the critical legal interpretation of International Law and the Grotian Heritage offered so far is Post-Structuralism. Lacking a precise or exhaustive definition, I would suggest that Post-Structuralism, along with its somewhat misleading synonym 'Post-Modernism', is best understood as a foundational 'turn' towards self-reflexivity within Critical Theory, centred upon the privileging of the textual, the discursive, and the literary. Post-Structuralism's deliberate emphasis of the inherent politicisation of all forms of Language compels it to focus upon the historical the preconditions governing the production and 'policing' of discourse. Inverting the teleological impulses of conventional critical theory—'the first step in a critical effort must arise from a gesture of inversion'¹²—Post-Structuralism advances a theoretical understanding of juro-political speech as an historically embedded enterprise that is not subject to the deterministic logic of the Marxist dialectic.¹³

'The United States and the Origins of the Trusteeship System', *Review*, 14/2 (1991), 171–229, *passim*.

- 8 Anthony Anghie, 'Time Present and Time Past: Globalisation, International Financial Institutions, and the Third World', *International Law and Policy*, 32 (2000), 243–90, *passim*; Ngaire Woods, 'Order, Globalisation, and Inequality in World Politics', in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization and World Politics* (Oxford: Oxford University Press, 1999), 8–35, *passim*; Stephen Gill, 'Globalisation, Market Civilisation, and Disciplinary Neoliberalism', *Millennium*, 24/3 (1995), 399–423, *passim*.
- 9 Structural Adjustment Programmes; see David P. Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standards of Liberal, Globalised Civilization', *Texas International Law Journal*, 35 (2000), 386–413, *passim*.
- 10 Anghie, 'Finding the Peripheries: Colonialism in Nineteenth-Century International Law', *passim*.
- 11 Mark Tushnet, 'Critical Legal Studies: A Political History', *Yale Law Journal*, 100 (1991), 1515–44, *passim*.
- 12 Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for the 'Indian Past?', *Representations*, 37 (1992), 1–26 at 8.
- 13 Which is precisely why so many critical legal scholars of the orthodox Left tend to resist Post-Structuralism; 'The deconstruction of the liberal actor leaves political theory without a revolutionary subject to overthrow capitalism and voluntarily

The Post-Structuralist theorist who is the most amenable to critical legal theory is Derrida.¹⁴ The practice of Deconstruction, the Derridean mode of critical discursive/textual analysis, is predicated upon four major theoretical pillars:

(i) *The Inversion of Hierarchies*/'*The Metaphysics of Presence*'¹⁵/*Iterability*:¹⁶ All textual meaning (sign-systems) are dependent for their efficaciousness upon a prior tactical deployment against an opposite/oppositional meaning, this 'reversibility of placement' serving as the ground of meaning for each individual word/meaning. For the purposes of International Law, every 'State' or 'Sovereign' depends upon the coherency and intelligibility of the notion of 'Non-State' and 'Non-/Quasi-Sovereign' in order to be able to operate within a speech/discourse system (*langue/parole*); the meaning of any individual word is exhaustively determined by its place within the Text.¹⁷ As every sign necessarily requires the existence/presence of its 'Other,' any conventionally accepted hierarchy of meaning ('The State is the principal actor in International Law'), is always subject to a radical form of inversion/subversion ('The sub-State actor may be re-defined as a State'). Every manifest Text necessarily invokes its Opposite; as 'the essential property of the sign is its iterability'¹⁸... the history of law is iteration.'¹⁹

(ii) *Difference*:²⁰ a broader application of the concept of iterability, governing the preconditions of speech as such.

reconstruct an alternative social convention.' Thomas C. Heller, 'Structuralism and Critique', *Stanford Law Review*, 36 (1987), 127–98 at 167.

- 14 'Derrida is above all interested in the connection (and misconnection) between what we want to say and the signs [re. Saussure] we use to express our meaning. In short, he is interested in the interpretation of texts and that is hardly strange territory for lawyers, who spend most of their time trying to understand what other lawyers have said in legal texts.' J. M. Balkin, 'Deconstructive Practice and Legal Theory', *Yale Law Journal*, 96 (1987), 743–86 at 744. See Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', in Drucilla Cornell (ed.), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992). See also Gayatri Chakravorty Spivak, 'Translator's Preface', in Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976), ix–lxxxvii; Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 3–43; Richard Rorty, *Essays on Heidegger and Others* (vol. ii of *Philosophical Papers*). (Cambridge: Cambridge University Press, 1991), 85–128.
- 15 Jonathan D. Culler, *On Deconstruction: Theory and Criticism After Structuralism* (Ithaca: Cornell University Press, 1982), 100–9, 159–87 and 200–5.
- 16 Rudolphe Gasche, *The Tain of the Mirror: Derrida and the Philosophy of Reflection* (Cambridge: Harvard University Press, 1986), 212–17.
- 17 Jonathan D. Culler, *Saussure* (Glasgow: Fontana/Collins, 1976), 29–34.
- 18 Balkin, 'Deconstructive Practice and Legal Theory', 799.
- 19 Ibid. 765.
- 20 Rodolphe Gasche, *Inventions of Difference: On Jacques Derrida* (Cambridge: Harvard University Press, 1994), 82–106; Gasche, *The Tain of the Mirror*, 194–205.

Differance simultaneously indicates that (1) the terms of the oppositional hierarchy are differentiated from each other (which is what determines them); (2) each term in the hierarchy defers the other (in the sense of making the other term wait for the first term), and (3) each term in the hierarchy defers *to* the other (in the sense of each being fundamentally dependent upon the other.)²¹

Critical is the inextricable relationship between words or concepts that are ordinarily read in mutually exclusive terms; *differance* indicates precisely 'this inevitability of the differentiation (setting off) from, and deferment (pushing away) of the trace or track of all that is not being defined or posited.'²²

In a traditional philosophical opposition we are not dealing with the peaceful coexistence of *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other (axiologically, logically, etc.), or has the upper hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment.²³

Deconstruction highlights the parallelism inherent in the production of all textual meanings.

Once the hierarchy of the more basic term over the less basic term is deconstructed, we see that the more basic term depends upon the less basic...In other words, neither term of the opposition can be originary [sic] and fundamental because both are related to each other in a system of mutual dependencies and differences. Each is continually called upon the other for its foundation, even as it is constantly differentiating itself from the other.²⁴

Accordingly, the praxis of de-constructionist, or subversive oppositional reading, is focussed upon the *precise* moment that the incisive reversal of the established hierarchy may take place; 'by means of a double gesture, a double science, a double writing, [the de-constructionist puts] into practice an *overturning* of the classical opposition *and* a general *displacement* of the system.'²⁵

(iii) *The (Arche-)Trace*:²⁶ the operational effect of the subordinated Other/alternative sign within and through 'unconscious' (repressed?) sub-textual meanings.

21 J.M. Balkin, 'Deconstructive Practice and Legal Theory', *Yale Law Journal*, 96 (1987), 743–86 at 752.

22 Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge: Harvard University Press, 2003), 424.

23 Jacques Derrida, *Positions* (London: Athlone, 1981), 41.

24 Spivak, *A Critique of Postcolonial Reason*, 751.

25 Jacques Derrida, *Margins of Philosophy* (Brighton: Harvester Press: 1982), 329.

26 Gasche, *Inventions of Difference*, 40–9 and 160–70; Gasche, *The Tain of the Mirror*, 186–94, 277–8 and 289–92; Culler, *On Deconstruction*, 94–6.

Most generally speaking, the originary trace designates the *minimal structure* required for the existence of any difference (or opposition) of terms (and what they stand for)²⁷... The trace is what makes deconstruction possible; by identifying the trace of the concepts in each other, we identify their mutual conceptual interdependence. The concepts of hierarchical oppositions create the possibility of each other's existence; they form, shape or identify each other by their absence. This necessary conceptual support is the 'trace' of the absent concept.²⁸

The repressed 'Presence' of 'the Other' is never consciously acknowledged; rather, as 'referential structure' or 'structure of reference,' the arche-trace serves as an 'irreducibly originary synthesis, capable of constituting differences... a minimal structure of referral to the extent that it constitutes differences between terms and entities.'²⁹ This facilitates the hermeneutical re-construction/interpretation/reading of Texts, with the critical reader performing the role of terminally suspicious 'psychoanalyst.' As concerning the Grotian Heritage, one would hypothesise: 'the ostensibly "*just*" *international law Text De Indis* contains the traces of the *exploitative politics* of colonialist *practices*.' (justice/law/text :: exploitation/politics/practices).³⁰

(iv) *The Logic of the 'Dangerous' Supplement*:³¹ the Derridean version of the problem of infinite regression. If every sign-system exists within and through *difference*/trace/iterability and is, therefore, ultimately reversible, then wherein lies the logically necessary foundational principle that axiomatically governs the determinacy of any particular textual construction/juridical decision?

*There is nothing outside of the text*³²... What we have tried to show by following the guiding line of the 'dangerous supplement,' is that in what one calls...real life...there has never been anything but writing; there have never been anything but supplements... The absolute present, Nature [the 'Real']... has always already escaped, has never existed.³³

Without pressing the analogy between Deconstruction and Psychoanalysis too far, the dangerous supplement may be interpreted as the 'unconsciousness' of the Text; it is this *sub-text* that 'governs' the expression(s) of the surface Text. As with

27 Gasche, *The Tain of the Mirror*, 187.

28 Balkin, 'Deconstructive Practice and Legal Theory,' 752.

29 Gasche, *The Tain of the Mirror*, 190.

30 'A trace represents a *present* mark of an *absent* (presence).' Gasche, *Inventions of Difference*, 45.

31 Derrida, *Of Grammatology*, 141–64. See Culler, *On Deconstruction*, 102–6, 166–70, 193–200 and 217–18; Gasche, *The Tain of the Mirror*, 205–17; Christopher Norris, *Derrida* (London: Fontana Press, 1987), 108–22.

32 There is no knowledge of any kind 'outside' of the synchronic process of interpretation.

33 Derrida, *Of Grammatology*, 158–9.

the human unconscious, the sub-text contains the polar inversion of the manifest meaning; as discussed above, every discussion of the international law of peace necessarily invokes the defining 'presence' of war. Taking this argument even further, we may say that the logic of the dangerous supplement plays a role within Deconstruction anomalous to the one performed by the notion of 'ideological contradiction' within orthodox neo-Marxism. In both critical theories, internal tension and instability in systems of social and cultural formations are the signs of an absence of a condition of unifying totality. The vital difference between the two is that whereas Marxism postulates an ultimate overcoming and suspension of the deficient and contradictory state of alienation through the teleological progression of History, Deconstruction eternally defers such a consummation through its understanding of Language as *differance*: Language and its epistemological correlative 'Truth' are always indeterminate *precisely because the sufficient pre-condition for Meaning, Presence, is eternally absent*. Therefore, every Text is in some sense open and uncertain because the absence of Presence allows for the perpetual intrusion of an oppositional Other.

There is a... kind of discursive heterogeneity which in fact defies categorization properly speaking. In each instance it comprises a multiplicity of very different and radically incommensurable layers that invariably make up discursive wholes...discursive inequalities or dissimilarities [are themselves] due to these conflicting strata within the coherence of texts or works.³⁴

The logic of the dangerous supplement 'attempts to unite in one structure a number of contradictory statements and propositions an origin, in such a manner that this contradiction is not obliterated but, on the contrary, [is] explicitly accounted for.'³⁵

The implications of Deconstruction for CLS are two-fold. Firstly, the logic of the dangerous supplement closely parallels the 'indeterminacy principle' of Legal Realism: 'There is no authoritative or uniquely correct formulation of any rule to be extracted from cases.'³⁶ As 'the legal system contains competing rules which will be available for a judge to choose in almost any case... the judge must make a choice which is not dictated by the law.'³⁷ Accordingly, there is never any 'final point' at which the judge/adjudicator becomes so privileged as to make authoritatively 'correct' decisions; 'the disfavoured pole [Derrida] calls the dangerous supplement, "dangerous" because of its undermining potential, its role in revealing to us that things are not, after all, what they seem...The judge can often write

34 Gasche, *The Tain of the Mirror*, 133 and 131.

35 Ibid. 26.

36 H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 131; see *ibid.* 119 and 123–5.

37 Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin', *Philosophy and Public Affairs*, 15/3 (1986), 205–35 at 209 and 217.

an opinion that appears more coherent because of what he is able to leave out.’³⁸ Secondly, such juridical choices that are actually made are governed, in turn, by discernibly political modes of reasoning. Here, ‘politics’ signifies the process by which reversible meanings have managed to become invested with hierarchical superiority in the legal practice more narrowly and the social order more broadly, at the exact moment in time at which the choice/opinion is actually made. ‘Deconstruction operates as a momentary reversal of privileging... The act of privileging requires the privileged term to be foundational, complete, self-sufficient; however, it is none of these things. It is related to the non-privileged term in a system of mutual differentiation and dependence, or difference.’³⁹

Deconstruction is especially relevant to the Grotian Text, as it is expressly centred upon a series of ‘twined’ opposites (i.e. *mare clausum/mare liberum*)⁴⁰ that are replete with both juridical and social significance.

Deconstruction allows us to see that ideologies are signs or metaphors that describe social life. They are privileged conceptions of social reality; they are supplements, which can in turn be supplemented. Like Derrida’s signs, they are not self-sufficient, but ultimately depend upon the very aspect of human life that they deny and from which they differentiate themselves. Every ideology suffers from an elementary lack: its dependence on what it denies, on what it is exalted over. This lack, this *différance*, is what we seize upon and exploit in a deconstructive reading.⁴¹

CLS critique ironically turns back on itself at this juncture; if there are no coherent sets of self-legitimizing meanings, then the objective ‘justness’ or ‘fairness’ of the social order can never be conclusively proven, allowing for the endless ‘play’ of hierarchical assumptions within the political arena.

Most of us assume that the Rule of Law requires that legal materials will be essentially determinate in meaning; that there will be a privileged interpretation of the legal text. If a text had many meanings, and no one ‘authentic’ or privileged meaning, it would be impossible to treat like cases alike according to general and knowable universal principles equally applicable to all citizens. Moreover, if a text had many equally valid interpretations, no interpretation could have an exclusive claim to legitimacy and command the respect of all citizens.⁴²

For International Law, the critical implications are obvious: CLS points to either the impossibility of actually achieving, or, if having achieved, at any time ever

38 Clare Dalton, ‘An Essay in the Deconstruction of Contract Doctrine,’ *Yale Law Journal*, 94 (1985), 999–1114 at 1007 and 1005.

39 Balkin, ‘Deconstructive Practice and Legal Theory,’ 765 and 761.

40 See below, Chapter Four.

41 Ibid. 764.

42 Ibid. 781.

actually knowing with certainty, a 'truly' equitable and non-hierarchical international system.

I would suggest that a poststructuralist account of the law treat any existing set of legal practices as a succession of theoretically arbitrary signs. Like language games or forms of life for Wittgenstein, such practices are reproduced across time as unanalysed ways of being in the world. The core of the training and the work of lawyers is to learn these practices and how to manipulate them. In situations where legal practices are disturbed, the resettlement of an altered practice is not determined positively by the logical application of theoretically coherent rules, but rather proceeds alogically, or analogically, and may involve some mode of reference to contemporaneous competing theoretical practices. At any given time, we should expect to discover contradictory (though arguably linked) discourses coexisting within the systems of both legal theory and legal practice. These render the nature of systematic reproduction complex. This image of the law leads away from the idea that the legal theory of the subject... unequivocally determines legal practice. It suggests instead that [Post-]Structuralism be seen as an assault of theory upon theory within institutions where theory is produced. To argue that the scope of delegitimation in a poststructural analysis is limited is not to deny the deconstructive power of structural analysis. *However, the impact of delegitimation will depend on the relationship between the separate institutional systems in which the practice of legal theory and the practice of law occur.*⁴³

The final sentence is crucial. Postulating a necessary inter-textual/discursive linkage between International Law (Discourse) and International Relations (Power), CLS/Post-Structuralism facilitates a radical critique of international public order, both in materialist and in ideological terms.

[Critical Theory] asserts that the discipline [of International Law] is governed by a particular historically conditioned discourse which is, in fact, quite simply the translation onto the international domain of some basic tenets of liberal political theory. It opposes itself to positivist international law, as representative of an actual consensus among states. The crucial question is simply whether a positive system of universal international law actually exists, or whether particular states and their representative legal scholars merely appeal to such positivist discourse so as to impose a particularist language upon others as if it were a universally accepted legal discourse. So post-modernism is concerned with unearthing difference, heterogeneity and conflict as reality in place of fictional representations of universality and consensus.⁴⁴

Traditionally, international lawyers have been reluctant to critically interpret International Law in terms of either History or Politics, preferring an endlessly

43 Thomas C. Heller, 'Structuralism and Critique', *Stanford Law Review*, 36 (1987), 127–98 at 187–88. Emphasis added.

44 Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law', *European Journal of International Law*, 2/1 (1991), 66–96 at 66.

repetitive rhetorical cycle: 'For more than a century, international lawyers have imagined each new [professional] moment as the overcoming of sovereignty, formalism, autonomy, politics, and the coming of into being of law, pragmatism and international community.'⁴⁵ Byers has tentatively suggested that the predominantly a-political nature of international legal discourse is due to a self-serving formalism that focuses interest exclusively upon 'law-as-rules'; as a result, most practitioners 'have seemed reluctant to investigate how power might affect [legal] obligation and, more precisely, how it might affect the process of law creation.'⁴⁶ Extended critical self-reflection upon the political nature of International Law raises the foundational dilemma of the (presumed) non-political sources of legal obligation, threatening international legal order with illegitimacy and indeterminacy;⁴⁷ conversely, any attempt to maintain an a priori distinction between normative and functionalist analyses of juro-political behaviour is imperilled by self-subversion, through the immanent collapse of Law into Politics.

Ultimately, a philosophical convergence between International Law and Relations is achieved through the positing of a normatively derived notion of a self-policing international legal community of Nation-States. Herein, the *epistemological* biases of International Law—the determinacy of textual interpretation; the self-legitimizing nature of doctrine—is paralleled by the *metaphysical* prejudices of International Relations—the State as both unitary self and as rational actor. Accordingly, crucial institutional and doctrinal innovations within international *societas*—the balance of power, positivism, Sovereignty—receive both normative and functional expression on both the planes of political 'choice' and legal 'rules.'⁴⁸

45 David Kennedy, 'My Talk at the ASIL: What is New Thinking in International Law?', *American Society of International Law Proceedings*, April (2000), 3–18, *passim*.

International legal histories...have generated a number of common assumptions about the field: that international law is dominantly about states and sovereignty; that its dominant interpretative method is rather formal compared to that of other fields; that consent lies at the heart of its binding force. That 'it' is law rather than politics, and international, rather than local. That its rules are public, rather than private. That the field has progressed, just as international society has progressed, from a period of sovereign autonomy to one of international community, from a time of rules to a period of principles, from a law of doctrines to one of institutions, from governments roped together by treaties to an open-ended process of global governance, from a formal legal method to something more functional, modern and pragmatic.

Ibid. 4.

46 Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), 15; see *ibid.* 35–40 and 45–50. 'Many international lawyers have assumed, to varying degrees, that international law is the result of processes which are at least *procedurally* objective and in that sense apolitical.' Ibid. 35.

47 Ibid. 47.

48 'The too frequent neglect by international lawyers of... interrelationships between international law and non-legal normative structures is in part the result of positivist conceptions of law as a specialized and pure form of inquiry.' Benedict Kingsbury,

Both discursive regimes are premised upon an inherently progressive model of international order, the 'Grotian Heritage' serving as a key signifier of both.

I Apologetics and Utopias: Martti Koskenniemi and David Kennedy

International Law is, therefore, a particularly ripe target for Deconstruction, as legitimacy and legitimising stratagems are essential to the operations of the international system. As 'cost-efficient' global governance ultimately depends upon the volitional consent of Sovereign-States, ideological compliance and 'coercive socialisation' become indispensable.⁴⁹ 'Institutional systems' of International Law are structural expressions of geo-governance, the inherently asymmetrical hierarchies of a global Liberalism masquerading as neutral expressions of the Rule of Law. Expressed in another way, discursive praxis (*De Indis*) equates with *structural power*, and material (ist) praxis with *relational power*, each wholly subject, in turn, to the rules of iterability. Concerning

the nature of power in international relations, a useful and analytical starting point is to distinguish between two forms of power in the international system. One, structural power, refers to the way in which a dominant state shapes the framework of international relations and specifies the 'rules of the game' needed to uphold it. The other, relational power, deals with the negotiations, pressures, and conflicts that determine the outcome of particular contexts within this broad framework.⁵⁰

The leading international CLS scholars working within the Post-Structuralist tradition are David Kennedy and Martti Koskenniemi. For both scholars, 'express international legal arguments, doctrines and "schools" are a kind of parole which refer back to an underlying set of assumptions, capable of being explained as the langue or "deep-structure" of the law.'⁵¹ International legal discourse operates within a 'constrained structure'/'finite set of dichotomies', each pairing invested with its own plenary Metaphysics of Presence. These binary pairings, in turn, invite iterability and a parodistic inversion of metaphysical hierarchy; precisely because International Law is oppositional, it therefore can be thoroughly decon-

'Legal Positivism as Normative Politics: International Society, Balance of Power and Lass Oppenheim's Positive International Law', *European Journal of International Law*, 13/2 (2002), 401–36 at 436.

49 'The four indicators of rule legitimacy in the international community of States are: determinacy, symbolic validation, coherence, and adherence to a normative hierarchy.' Thomas M. Franck, 'Legitimacy in the International System', in Martti Koskenniemi (ed.), *International Law* (New York: New York University, 1992), 157.

50 P. J. Cain and A. G. Hopkins, 'Afterword: The Theory and Practice of British Imperialism', in Raymond E. Dummett (ed.), *Gentlemanly Capitalism and British Imperialism: The New Debate on Empire* (New York: Longman, 1999), 204.

51 Martti Koskenniemi, *From Apology to Utopia: The Structures of International Legal Argument* (Helsinki: Lakimieslitton Kustannus, 1989), xix.

structed.⁵² For Kennedy, *differance* is the 'key' to international legal discourse; Law is thoroughly rhetorical in nature, yielding a 'practice of interminable discourse',⁵³ that, paradoxically, 'seems the subtle secret of its success.'⁵⁴ Herein, 'success' is premised upon the indefinite postponement of arriving at a meaning through the perpetual re-intervention of indeterminacy.

Within international law positioned between the two poles, each pole can claim its primacy as correct. But as a consequence, neither can actually resolve problems arising under international law. This conclusion represents the negative side of the structure of international legal argument. International law employs a pattern of self-referential arguments that continually shift the source of its authority and origin in the effort to navigate between public order and sovereign will.⁵⁵

Following the binary logic of *differance*, International Law undergoes a recurrent 'discursive oscillation' between prescriptive and descriptive pole, an endless cycle of 'repetition and renewal' governed by the insular self-referentiality of legal discourse.

To prevent international law from losing independence vis-à-vis international politics the legal mind fights a battle on two fronts. On the one hand, it attempts to ensure the *normativity* of the law by creating a distance between it and State behaviour, will and intent. On the other hand, it attempts to ensure the law's *concreteness* by distancing it from a natural morality. A law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, or mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way.⁵⁶

Paradoxically

52 See David Kennedy, *International Legal Structures* (Baden-Baden: Nomos Verlagsgesellschaft, 1987), 203–4, on Grotius and Selden, and 193–286, *passim*; Martti Koskenniemi, 'Hierarchy in International Law: A Sketch', *European Journal of International Law*, 8/4 (1997), 566–82, *passim*.

53 Kennedy, *International Legal Structures* 287–94.

54 Ibid. 294. See also, David Kennedy, 'Theses about International Law Discourse', *German Yearbook of International Law*, 23 (1980), 353–91, *passim*. See David J. Bederman, 'Stalking Phaedrus', *Georgia Journal of International and Comparative Law*, 18 (1988), 529–34, *passim*.

55 Nigel Purvis, 'Critical Legal Studies in Public International Law', *Harvard Journal of International Law*, 32/1 (1991), 81–127 at 107.

56 Koskenniemi, *From Apology to Utopia: The Structures of International Legal Argument*, 2.

To show that an international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete—that it binds a State regardless of that State's behaviour, will or interest but that its consent can nevertheless be verified by reference to actual State behaviour, will or interest.⁵⁷

For Koskenniemi, International Law eternally oscillates between the contending poles of 'Apology' and 'Utopia'; within the logic of *difference* both Normativity/Naturalism and Concreteness/Positivism continuously invoke the 'presence' of the other.⁵⁸ Here, the logic of the dangerous supplement operates in full, arbitrarily and unpredictably favouring one pole at the expense of the other.

Reconciliatory doctrines will reveal themselves as either incoherent or making a silent preference. In both cases, they remain vulnerable to criticisms from an alternative perspective. But this perspective, once forced to defend itself, will fare no better. Consequently, doctrine is forced to maintain itself in constant movement from emphasizing concreteness to emphasizing normativity and vice-versa⁵⁹ without being able to establish itself permanently in either position⁶⁰... Indeterminacy follows as a structural prop-

57 Ibid. Compare this with Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press, 1986), 108:

It is inevitable that, if each legal norm is created by the parties to achieve their ends, the law as such cannot have objects. Any attempt to outline law with an essentially material content will appear as a natural law approach. This will be regarded as a subjective 'ought' opposition, without effective importance in the regulation of international relations.

58 Even the arch-Realist Morgenthau intuitively perceived the binary nature of legal discourse.

Yet positivism has never been able to live up to its legalistic and anti-metaphysical assumptions. The very nature of its subject-matter has compelled it time and again to violate its own assumptions and make use of fundamental principles not 'revealed' by positive law. In order to give at least apparent satisfaction to these assumptions, positivism dares to make use of such principles only under the disguise of positivist concepts, and therefore develops a fictitious method which tries by pseudo-logical arguments to derive from 'positive', that is, written, rules of international law something that those laws do not contain. The interminable and quite sterile discussions on the foundation of the binding force of international law are evidence of this word-juggling, since this is a problem which, as defined in the positivist terms of mutual consent and the like, is contradictory in itself, and hence insoluble within the framework of positivism. The foundation of the binding force of 'positive' law can logically be found, not in this 'positive' law itself, but only outside it.

Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, Brief Edition, rev. Kenneth W. Thompson (New York: McGraw-Hill, 1981), 265

59 Or, alternatively, 'Sociology' and 'Ethics'. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 488–509.

60 Koskenniemi, *From Apology to Utopia*, 46

erty of international legal language itself⁶¹... Given the presence of competing theories at all levels of abstraction, the selection of one theory over others involves political choice. Legal reasoning as it relates to theorizing is correctly described as the process of choosing between theories, rather than a process of legal determinacy.⁶²

In Koskenniemi's meta-level view, each of International Law's twin pillars consist of a chain of 'signs': Apology discursively equates to Positivism, which is signified by induction, the factual, Realism, and 'ascending'⁶³ argument; Utopia discursively equates to Naturalism, which is signified by deduction, the normative, Idealism, and 'descending'⁶⁴ argument. However, because of the logic of the dangerous supplement, the binary opposition ultimately works towards subverting itself.

My... assumption [is] that there is a distinct discourse called 'international law' which is situated somewhere between politics and natural morality (justice) without being either...[The mainstream view is] that these distinctions can be maintained through seeing international law as objective in comparison to the subjectivity involved in politics and theories of justice⁶⁵... The separation of the creation and ascertainment of legal rules cannot be consistently maintained. Their fusion into each other threatens the law's concreteness and normativity and makes ultimately doubtful whether any meaningful distinction between international law, politics and morality can be made.⁶⁶

Expressed in the strongest manner, International Law cannot give a coherent, self-grounding, and, ultimately, self-legitimizing account of itself within the terms of Law alone. Instead, International Law, insofar as it exists at all, exists precisely as this repetitive discursive oscillation between these rival poles. 'Law cannot be self-contained; for the obligation to obey it must always rest on something outside of itself.'⁶⁷

61 Ibid. 44

62 Purvis, 'Critical Legal Studies in Public International Law', 108.

63 A rhetorical shift from the secular to the transcendental; 'Is' governs 'Ought'.

64 A rhetorical shift from the transcendental to the secular; 'Ought' governs 'Is'.

65 Liberalism. 'It is difficult to understand liberalism as materially controlling because it does not accept for itself the status of grand political theory. It claims to be apolitical and is even hostile to politics... [a procedural principle that is] merely an objective neutral structure within which different legal theories compete for influence.' Koskenniemi, *From Apology to Utopia*, 64.

66 Ibid. 8.

67 Edward H. Carr, *The Twenty Year's Crisis 1919–1939: An Introduction to the Study of International Relations* (London: Macmillan, 1954), 178. In many respects, Koskenniemi's Post-Structural critique of International Law invokes Carr's earlier neo-Realist assault. See *ibid.* 170–8.

It has been observed that the fundamental question of political philosophy is why men allow themselves to be ruled. The corresponding question which lies at the root of jurisprudence is why men obey the law. Why is law regarded as binding? The answer

The central component of the process and structure of International Law is thereby revealed to be the (self-) legitimization of authority.⁶⁸ But this exercise in ideological justification ultimately proves impossible as legal rhetoric perpetually oscillates between the utopian pole of Naturalism—currently Liberal Millenarianism—and the apologetic pole of neo-colonialism. Ironically,

International Law is singularly useless as a means for justifying or criticizing international behaviour. Because it is based on contradictory premises it remains both over- and under-legitimising: it is over-legitimising as it can be ultimately invoked to justify any behaviour (apologism), it is under-legitimising because incapable of providing a convincing argument on the legitimacy of any practice (utopianism).⁶⁹

II World-system Analysis, Post-colonialism, and International Law

The crucial challenge confronting any attempt to provide a comprehensive CLS account of the historical genesis of *De Indis* lies in the formulation of a model that satisfactorily links Post-Structuralism with the material praxis of the early modern interstate system. Intriguingly, a number of international CLS scholars have adopted an expressly Post-Structuralist methodology in providing incisive critiques of the intrinsically hierarchical and neo-colonialist nature of Interna-

cannot be obtained from the law itself any more than a proof of Euclid's postulates can be obtained from Euclid. Law proceeds on the assumption that the question has been satisfactorily disposed of. But it is a question which cannot be burked by those who seek to justify the 'rule of law'. It applies to international as well as to municipal law. In international law, it sometimes takes the form of the question whether, and on what grounds, treaties are binding. The legal answer to this question is that treaties are binding in international law, which includes the rule... that treaties must be kept [*pacta sunt servanda*]. But what the questioner probably means to ask is: Why is international law, and with it the rule that treaties must be kept, binding, and should they be regarded as binding at all? These are not questions which can be answered by international law.

Ibid. 172.

- 68 For a particularly naïve epistemological exposition of this very point, see Franck, 'Legitimacy in the International System', 157–8:

Perhaps the most self-evident of all the characteristics making for legitimacy is textual determinacy. What is meant by this is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules with a readily ascertainable meaning may have a better chance than those that do not regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process. Those addressed will know precisely what is expected of them, which is a necessary first step towards compliance... Each rule has an inherent pull power that is independent of the circumstances in which it is exerted and that varies from rule to rule. This pull power is the index of legitimacy.

- 69 Koskenniemi, *From Apology to Utopia*, 48.

tional Law.⁷⁰ The key to the Post-Colonialist approach has been the deconstruction of the iterable relationship governing International Law-as-Rhetoric and International Law-as-Colonialism through the temporal conjunction between the discursive emergence of International Law with the material foundations of European colonialism. For Post-Colonialism, the praxis of States is necessarily imperialist; ergo, International Law as discourse is implicated in empire-formation. The crucial point is that such empire-formation is not merely an exercise of Power but equally one of Knowledge, deploying its own taxonomy, vocabulary, nomenclature, and methodology.

It is in the particular historical circumstances of Europe of the fifteenth-sixteenth centuries that the particular definition of the entity called the state emerges, as did the particular law governing the relations of these entities, namely international law. The constitutive characteristic of these entities was, and remains, sovereignty, which is a composite of political independence and juridical equality. The law governing relations of sovereign states was, and remains, international law, created through the ingenuity of the sovereignty-compatible techniques of consent. This consent of states to a principle was, and is, discerned in the conjunction of general and concordant practices of states (*usus diuturnus*) regarding a certain way of doing things with their conviction that they are bound by law to follow that practice (*opinio juris sive necessitatis*). This process is abbreviated under the law of custom and has produced a whole body of principles of international law.⁷¹

As a result of its Euro-centric origins, International Law continuously replicates the historical 'traces' of colonialist praxis and Liberal theory. Accordingly

Emergent liberal thinking about the international legal order argues increasingly that it is possible to divide the world into zones, with a liberal zone of law, constituted by liberal states practising a higher degree of legal civilization, to which other states will be admitted only when they meet the requisite standards. This is in some respects a continuation of recurrent patterns in the history of Western legal thought, traceable, for example, in the sixteenth-century divisions between Christians and infidels, or in James Lorimer's late-nineteenth century division of the world into a hierarchy of civilized nations, barbarous humanity, and savage humanity.⁷²

70 See Anne Riles, 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture', *Harvard Law Review*, 106 (1993), 723–40, *passim*.

71 Surya Prakash Sinha, *Legal Polycentricity and International Law* (Durham: Carolina Academic Press, 1996), 15. 'To a certain extent, international law has always been about suppressing cultural differences.' David Kennedy, 'International Legal Education', *Harvard International Law Journal*, 26/2 (1985), 361–84 at 380.

72 Benedict Kingsbury, 'Sovereignty and Inequality', *European Journal of International Law*, 9 (1998), 599–625 at 609.

It is my contention that World-Systems Analysis is especially well suited to the task of providing a more comprehensive historical framework to the Post-Colonialist critique of International Law. As with both Post-Structuralism and Post-Colonialism, World-Systems Analysis is committed to both an epistemological and an ideological critique of hegemonic geo-culture, expressly linking a critical theory of knowledge to an oppositional politics; for Wallerstein, 'our epistemology must be both nomethic and idiographic, or rather it can be neither.'⁷³ In place of Post-Colonialism's ubiquitous concept of Euro-centrism,⁷⁴ World-Systems Analysis offers an equally hegemonic discursive construct of its own, Universalism. Adopting what is essentially a functionalist approach⁷⁵ Universalism is a formal epistemological sub-variant of the wider geo-culture: a binary taxonomic system that superimposes an episto-normative grid upon the World-System that broadly equates with Deconstruction's interpretative construct of Self/Other.⁷⁶

Universalism consists of two primary categories. The first, Humanist Universalism or 'essentialist particularism,' lays the epistemological foundation for all

73 Immanuel Wallerstein, *The Uncertainties of Knowledge* (Philadelphia: Temple University Press, 2004), 148. Insofar as World-Systems Analysis has an epistemology of its own, it may be broadly categorized as Critical Realism. See *ibid.* *passim*.

74 'Broadly speaking, Eurocentrism is a pervasive bias located in modernity's self-consciousness of itself. It is grounded at its core in the metaphysical belief or Idea (*Idee*) that European existence is qualitatively superior to other forms of life.' Tsenay Serqueberhan, 'The Critique of Eurocentrism and the Practice of African Philosophy,' in Emmanuel Chukwudi Eze (ed.), *Postcolonial African Philosophy: A Critical Reader* (Oxford: Blackwell, 1997), 141–61. 'The term "idea" (i.e., the German *Idee*) designates a theoretical or practical construct of the imagination which serves to give guidance to the theoretical and practical efforts of human reason.' *Ibid.* 157 fn. 3.

75 'Among the specificities of the capitalist world-economy was the development of an original epistemology [Universalism], which it used as a key element in maintaining its capacity to operate.' Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New York: The New Press, 2006), 48.

76 For the significance of Taxonomy in legal discourse, see above, Chapter One. It is under-appreciated that World-Systems Analysis adopts a basically positive attitude towards Deconstruction, identifying it, somewhat reductively, as a specialised branch of 'Cultural Studies'. Post-Colonialism, Post-Structuralism, and Post-Modernism are generically grouped together as anti-Universalist 'knowledge movements'. In his more recent work, Wallerstein has written at some length on the critical epistemological agenda of Cultural Studies.

The fundamental intention of cultural studies is not a sort of nihilistic destruction of knowledge, the total solipsistic relativism peddled by a few extremists. Rather, their [sic] historical mission has been two-fold: On the one hand, they have demonstrated that the so-called canons of good taste put forward by so many within the humanities [Alan and Howard Blom?] are socially constructed and therefore truly paternalistic. And on the other hand, the fact that particularistic canons have been put forward as universal norms is a product of the unequal hierarchies of the modern world-system, and has served to sustain those in power in this system.

Wallerstein, *The Uncertainties of Knowledge*, 69, 146.

of the Liberal Arts and Social Sciences during the peak era of intra-European imperial rivalry.

In our view, there were only six [Humanist disciplines] that were widely accepted throughout the scholarly world, and they reflected three underlying cleavages that seemed plausible in the late nineteenth century: the split between past (history) and present (economics, political science, and sociology); the split between the western civilised world (the above four disciplines) and the rest of the world (anthropology for 'primitive' peoples and Oriental Studies for non-Western 'higher civilisations'); and the split, valid only for the modern Western world, between the logic of the market (economics), the state (political science), and civil society (sociology).⁷⁷

The second, Scientific Universalism, premised upon reductionism and linear determinism, underlays the Natural Sciences.⁷⁸ Wallerstein postulates a clear but non-linear correspondence between Universalism and geo-culture: the 'evolution of the structures of knowledge is simply a part of—and an important part of—the evolution of the modern world-system. The structural crisis of one is the structural crisis of the other.'⁷⁹

Interestingly, Wallerstein does not list Jurisprudence in his schema of Universalist knowledge structures. This is somewhat surprising, particularly in light

⁷⁷ Ibid. 20.

⁷⁸ Wallerstein, *European Universalism*, 51–70. Just as much as the Social Sciences, the Natural Sciences served a colonialist purpose.

The modern world-system, the capitalist world-economy, required for its efficient operation a somewhat higher level of accuracy in forecasting [than that provided by traditional knowledge structures], without which the investment process so central to its functioning would never have acquired the extensiveness and level of risk-taking that has enabled it to expand and flourish. There was consequently considerable support and social sanction for a new mode of certifying truth, the mode we have come to call science or, more accurately, modern science.

Ibid. 35. Dussel has put forward the powerful thesis that the entire epistemic construct of 'Modernity' is nothing other than a systematic

rationalization proper to the management of the European centrality in the world-system... ['Rationalisation' is] *simplification*, apparently necessary for the management of the centrality of a world-system that Europe found itself in need of perpetually carrying out. Capitalism, liberalism, dualism... are *effects* of the management of this function which corresponded to Europe as centre of the world-system: effects that are constituted through mediations in systems that end up totalising themselves... In fact, the formal procedure of *simplification* that makes the world-system *manageable* produces formal rationalised subsystems that later on do not have internal standards of self-regulation within its own limits of modernity, which could be redirected at the service of humanity.

Enrique Dussel, 'Beyond Eurocentrism: The World-System and the Limits of Modernity', in Frederic Jameson and Masao Miyoshi (eds), *The Cultures of Globalization* (Durham: Duke University, 1998), 3–31 at 18, 16, and 17.

⁷⁹ Wallerstein, *The Uncertainties of Knowledge*, 70.

of the work of Critical Legal Scholars such as Koskenniemi demonstrating the indispensability of epistemological Universalism to the hegemonic operation of International Law. For New Stream scholarship, International Law is a 'process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made.'⁸⁰ The dangerous supplement of 'the subjective' working appositionally to the objective or universal project of International Law signifies an unresolved epistemological dilemma that manifests itself as rhetorical conflict.

In political terms, this [dilemma] is visible in the fact that there is no representative of the whole [the objective] that would not simultaneously be a representative of some particular [the subjective]. 'Universal values' or 'the international community' can only make themselves known through mediation by a State, an organization or a political movement. Likewise, behind every notion of universal international law there is always some particular view, expressed by some particular actor in some particular situation. This is why it is pointless to ask about the contribution of international law to the global community without clarifying first *what* or *whose* view of international law is meant. However universal the terms in which international law is invoked, it never appears as an autonomous and stable set of demands over a political reality. Instead, it always appears through the positions of actors, as a way of dressing political claims in a specialized technical idiom in the conditions of *hegemonic contestation*.⁸¹

Precisely because Universalism as a 'knowledge structure' is historically contingent it is unstable and, therefore, reversible: the absence of a self-grounding ontology, signified by the presence of temporality, renders Universalism subject to particularistic appropriations. It is precisely this condition of precariousness, both ontological and epistemological, that compels international legal discourse to operate in an hegemonic manner.

By 'hegemonic contestation' I mean the process by which international actors routinely

challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents. In law, political struggle is waged on what legal words, such as 'aggression', 'self-determination', 'self-defence', 'terrorist', or *jus cogens* means, whose policy will they include, whose they will oppose. To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their political view of that meaning appear as their total view, their preference seem like the *universal preference*.⁸²

80 Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration', *Cambridge Review of International Affairs*, 17/2 (2004), 197–218 at 198–99.

81 Ibid. 199.

82 Ibid.

An obvious objection appears at this point; it is simply misleading to present World-Systems Analysis as a 'strategic ally' of Post-Colonialism, much less as one for Deconstruction. The most immediate insurmountable obstacle to such a 'strategic alliance' is that World-Systems Analysis is both inherently Structuralist and Euro-centric; both are antithetical to both of the proposed allies. Wallerstein himself appears exemplary in both regards. As Braudel has reminded us, all structures 'provide both support and hindrance'⁸³ by forcing historical inquiry to come to terms with this question: outside of 'the rigid envelope of structure, are there free, unorganised zones of reality?'⁸⁴ The history of structure(s)—in Braudelian terminology, *la longue duree*—is not merely ontological, providing the meta-physical underpinning to the substantive 'truth' of History; it is also and equally epistemic, governing the process of historical interpretation.

The *longue duree* is the endless, inexhaustible history of structures and groups of structures. For the historian a structure is not just a thing built, put together; it also means permanence, sometimes for more than centuries (time too is a structure). This great structure travels through vast tracts of time without changing; if it deteriorates during the long journey, it simply restores itself as it goes along and regains its health, and in the final analysis its characteristics alter only very slowly.⁸⁵

Deconstruction can only work in opposition to this; as an extension of Post-Structuralism, it must necessarily operate so as to 'de-construct' all pre-given structures, ontological, epistemological, and hermeneutic.⁸⁶ Furthermore, it is the avowed opponent of every form of essentialism; not coincidentally, resistance to the Euro-centric world-view is the indispensable, the 'original', starting point of all modes of Post-Colonialist critique.

83 Fernand Braudel, 'History and the Social Sciences: The *Longue Duree*', in id., *On History* (Chicago: The University of Chicago Press, 1980), 25–54 at 31.

84 Fernand Braudel, 'History and Sociology', in id., *On History* (Chicago: The University of Chicago Press, 1980), 64–82 at 72.

85 Ibid. 75.

86 It is, in fact, rather easy to detect an element of Nietzschean *ressentiment* lurking within the Braudelian concept of *la longue duree*; Braudel composed his *The Mediterranean and the Mediterranean World in the Age of Philip II* while interned in a German POW camp during the Second World War.

I myself, during a rather gloomy captivity, struggled a good deal to get away from a chronicle of those difficult years (1940–45). Rejecting events and the time in which events take place was a way of placing oneself to one side, sheltered, so as to get some sort of perspective, to be able to evaluate them better, and not wholly to believe in them. To go from the short time span [the event], to one less short [the conjuncture], and then to the long view (which, if it exists, must surely be the wise man's time span); and having got there, to think about everything afresh and to reconstruct everything around on: a historian could hardly not be tempted by such a prospect.

Braudel, 'History and the Social Sciences', 47–8.

Nevertheless, I remain committed to my initial proposition: that World-Systems Analysis is especially well-suited to the task of providing a comprehensive, internally coherent, and practically useful framework, or episteme, to the Post-Colonial/Post-Structural critique of International Law. A clue to a possible way out of the apparent impasse is provided by Walter D. Mignolo in his path-breaking *Local Histories/Global Designs*; his work constitutes a full-fledged effort to integrate World-Systems Analysis into contemporary Post-Colonial theory. Mignolo's critical innovation here is what he de-notes as '*border thinking*', defined as '*thinking from dichotomous concepts rather than ordering the world in dichotomies*.'⁸⁷ Border thinking re-invests the Modern World-System with a radically heterogeneous or pluralistic epistemology. European colonialist penetration yielded a diffused but radical juxtaposition of parallel but non-identical modes of thought and speech; border thinking is, 'logically, a dichotomous locus of enunciation and, historically is located at the borders (interiors and exteriors) of the modern/colonial system.'⁸⁸ For Mignolo, the 'geohistorical density of the modern colonial world system, its interior (conflicts between empires) and exterior (conflicts between cosmologies) borders, cannot be perceived and theorized from a perspective of modernity itself (as is the case for world system analysis, deconstruction, and different postmodern perspectives).'⁸⁹ Mignolo accomplishes two things in this passage. He clearly establishes a discursive linkage between Deconstruction and World-Systems Analysis as potential subsidiary allies, or 'hand-maidens,' to the wider Post-Colonial project; neither approach is incorrect, but both are insufficient by themselves for syncretic border thinking. More importantly, Mignolo expressly re-conceptualises Post-Colonial critique in terms of knowledge structures, or epistemic fields, that correlate precisely to (shifting) zones of territorial demarcation, all of which are positioned in a state of radical iterability. Altering the orthodox terminology of World-Systems Analysis somewhat, Mignolo substitutes 'internal and external borders' for Wallerstein's triptych of centre, periphery, and semi-periphery.

Internal and external borders are not discrete entities but rather moments of a continuum in colonial expansion and in changes of national imperial hegemonies. The emergence of a new commercial circuit centred in the Atlantic and inclusive of both Spain and its domain in the Americas and the Philippines is one of the basic changes triggering a new imagery.⁹⁰

In a penetrating display of the practical applicability of the Braudelian concept of the structure, Mignolo re-casts the colonialist emergence of 'internal and exter-

87 Walter D. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2000), 85; see also, 3–88.

88 Ibid. 85.

89 Ibid. 37.

90 Ibid. 33–4.

nal borders' as a particular moment within *la longue duree* of the Modern World-System, precipitating a plurality of epistemic ruptures. For Mignolo, the 'colonial difference'—the 'space where [the] coloniality of power is enacted'⁹¹—operates in a 'double movement': 'rearticulating the interior borders linked imperial conflicts and rearticulating the exterior borders by giving new meanings to the colonial difference.' Herein, difference is the Post-Colonialist appropriation of Derridean *différance*; the lines of amity and the pluralistic 'geo-history' are the instauration of a parallel movement of exteriority and interiority. Geo-spatial structures signify zones of identity and temporally parallel but discursively incommensurable knowledge structures. Mignolo, an Iberianist, places Spanish hegemony of the 'long' 16th century at the centre of this 'double movement' within the emergence of *la longue duree* of the Modern World-System; 'In other words, the historical coexistence between the expulsion of the Jews and Moors and the "discovery" of America was at the same time a landmark for both modern colonialism and colonial modernities—that is, of modernity/coloniality.'⁹² The spatial and cultural heterogeneity of border thinking allows us to appreciate in a more sophisticated manner the radical alterity that prevails between colonising-Self and colonised-Other that we may now posit along an entire series of historically precise geo-spatial demarcations. Border Thinking is not 'translation,' which would essentialise meaning and identity;⁹³ rather it is the instauration of what might be described as an 'heterogenous parallelism,'⁹⁴ bringing together into a creative fusion the most compelling elements of Deconstruction, Post-Colonialism, and World-Systems Analysis. 'Border Thinking brings to the foreground the irreducible epistemological difference, between the perspective of colonial difference, and the forms

91 Ibid. ix.

92 Ibid. 49.

While the expulsion of the Moors demarcated the exterior of what would be a new commercial circuit and the Mediterranean became that frontier, the expulsion of the Jews determined one of the inner borders of the emerging system. The converso instead opened up the borderland, the place in which neither the exterior nor the interior frontiers apply, although they were the necessary conditions for borderlands. The converso will never be at peace with himself or herself, nor would he or she be trustworthy from the point of view of the state. The converso was not so much a hybrid as it was a place of fear and passing, of lying and terror.

Ibid. 29. I am indebted to Mignolo for singling out the Spanish *converso*—the 'converted' Jew and Moor of the Iberian frontier, outwardly conformist but inwardly suspect, an ideal 'double subject'—as an exemplar of 'internal colonisation,' this consistent with Post-Colonialism's 'double' focus on both the objective and subjective phenomenology of colonisation. See below, Chapter Eight.

93 Mignolo rightly defines translation as 'the special tool to absorb the colonial difference previously established.' Ibid. 3.

94 Border thinking 'works toward the restitution of the colonial difference that colonial translation (unidirectional, as today's globalisation) attempted to erase.' Ibid.

of knowledge that, being critical of modernity, coloniality, and capitalism, still remain within "the territory", "in custody" of the abstract universals.⁹⁵

This is a quintessential deconstructive insight and serves as the potential basis for a discursive convergence that can serve as the common ground for a strategic alliance. The lines of amity now possess a double significance for us. They are signs of the 'geohistorical density' of the 'modern/colonial world system'; they also signify the 'long' 16th century, the era of the 'Grotian Moment', as the temporal origin of this World-System. Mignolo himself is fully aware of the significance of the sixteenth-century origins of 'colonial modernity' for Post-Colonial scholarship.

The current and available production under the name 'postcolonial' studies or theories or criticism starts from the eighteenth century,⁹⁶ leaving aside the crucial and constitutive moment of modernity/coloniality that was the sixteenth century. Starting from the premise of modern world system analysis, I move toward a perspective that, for pedagogical purposes, I specify as modern/colonial world system analysis...Modernity, let me repeat, carries on its shoulders the heavy weight and responsibility of coloniality. The modern criticism of modernity (postmodernity) is a necessary practice, but one that stops where colonial differences begin. The colonial differences, around the planet, are the houses where border epistemology dwells.⁹⁷

The critical phrase 'border epistemology' provides the vital linkage between Deconstruction and World-Systems Analysis: the anti-hegemonic critique of every form of Universalism.⁹⁸

Re-conceptualising the relationship between deconstructive Post-Colonial critique and World-Systems Analysis provide us with a new, and hopefully robust, hermeneutic with which to critically interrogate the 'mainstream' view of the Grotian Heritage in both International Law and International Relations. The political environment that gave rise to the Thirty Year's War was not, therefore,

95 Ibid. 88.

96 The leading culprit here, of course, is *Orientalism* by Edward Said.

97 Ibid. 37.

98 The World-Systems scholar Lee strongly supports Mignolo on precisely this point.

The postmodern only makes sense in relation to the modern—that is, to those processes guaranteeing the primacy of capitalist accumulation; and to the modernist consciousness in the form of the concepts of progress, chronological directional time, and representational realism (where a turning point was reached with the invention of perspective in the fifteenth century at the very beginning of the history of the modern world-systems)... This is only a small step away from Braudel's plurality of social times, a concept that requires imaginative (but explanatory) constructs rather than an icy essentialism.

Richard Lee, 'The Structure of Knowledge', Terence H. Hopkins, et al. (eds), *The Age of Transition: Trajectory of the World-System 1945–2025* (London: Zed Books, 1996), 178–206 at 203. For further discussion of Braudel's plurality of social times, see below, this Chapter.

a dysfunctional pathology requiring a Rationalist ‘cure,’ but a functionally integrative event consistent with the inner political logic of the emerging Capitalist World-Economy. Parallel to the development of the intra-European balance of power was the ‘lines of amity’ system, that sought to stabilise great power rivalries through the displacement of military conflict to peripheral and semi-peripheral extra-European zones. Fixed upon the Tropic of Cancer and the Meridian of Ferro (the Canary Islands), Amity established the parameters separating licit from illicit acts of interstate competition. ‘Richelieu wrote that these lines separated the sphere of “reason” from that of “force”; beyond the lines the road of hostility began. There States lived in a state of nature; on the European side they lived in a state of society.’⁹⁹ For early international lawyers, the lines served as the prototypical instrument for pacific global governance.

It was desirable as well as possible to keep separate the question of power in the areas of colonial expansion of the great States of Western Europe and the question of power [within] Europe. The occupied territories within the new [sic] continents were not to be included in the horizon of the constellations of the occidental State system, in the hope of avoiding further confusion and aggravation of the complicated and entangled political relations of the European powers. It seemed that the States did not want to let their system of political balance in Europe be disturbed and transformed by disputes originating in the sphere of colonies and overseas trade.¹⁰⁰

From a World-System perspective, the Westphalian-era regime of the lines of amity is of twofold significance. Firstly, it permanently linked the ‘recognition’ of non-European polities with the medium of colonialism, juridically normalising hierarchical relationships between European and non-European actors. Secondly, the system proved inherently unstable, incapable of reconciling the latent contradiction between the ‘utopian’ goal of Naturalist global governance and the ‘apologetic’ reality of interstate rivalry.

[Within] the framework of the developing State system such an attempt could no longer be executed without contradiction, without mobilising the resistance of those nations which were excluded from the planned distribution of colonial territories. According to the structural rules of the new balance of power system, no privileged position of individual powers could be maintained unless it rested upon a predominance of political power; by its very nature this system granted all nations an equal chance of free political expansion on a global scale. It was contrary to the true nature of the balance of power system to recognize the authority of the Pope for settling disputes over colonial

99 Carl Schmitt, cited in Wilhelm G. Grewe, *The Epochs of International Law* (New York: Walter de Gruyter, 2000), 157.

100 Rein, cited in Grewe, *The Epochs of International Law*, 153. In Sir Francis Drake’s inestimable words, ‘No peace beyond the line.’ Ibid. 155. See Stanley Hoffman, *Janus and Minerva: Essays in the Theory and Practice of International Politics* (Boulder: Westview Press, 1987), 149–77.

territories.¹⁰¹ Corresponding attempts by the Spanish to master problems of this kind by returning to the universalistic ideas of law and order which had evolved during the late Middle Ages, were doomed to failure sooner or later because of this inherent contradiction.¹⁰²

What needs to be emphasised about the lines of amity is the manner in which they reflect Wallerstein's conception of the Capitalist World-Economy, as we have seen, a global interpretative model that is grounded upon geo-spatial principles. The World-Economy, the pre-statist precursor of and economic correlative to the Modern World-System,¹⁰³ is 'a unit with a single division of labour and multiple cultural systems,' devoid of 'a common political system.'¹⁰⁴ The Capitalist World-Economy is a 'system socially constituted by an integrated axial division of labour, whose guiding principle is the ceaseless accumulation of capital.'¹⁰⁵ The key mechanism to realise this principle has been the construction of extensive commodity chains of production that cross multiple political bodies.'¹⁰⁶ Such a World-

¹⁰¹ See below, Chapter Three.

¹⁰² Grewe, *The Epochs of International Law*, 153–4.

¹⁰³ 'The world-economy was only in the process of emergence during the sixteenth century... [it was] vast but weak.' Immanuel Wallerstein, *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974), 70, 68.

¹⁰⁴ Immanuel Wallerstein, *The Capitalist World-Economy* (Cambridge: Cambridge University Press, 1979), 5–6. Alternatively, a 'single division of labour but multiple polities and cultures.' Ibid. 6.

¹⁰⁵ The *differentia specifica* of the Capitalist World-Economy was, and was *only*, that the system was based on a structural priority given and sustained for the *ceaseless* accumulation of capital. Not, I insist, merely for the accumulation of capital, but for the *ceaseless* accumulation of capital. It is my view that such a system was created, initially in Europe in the sixteenth century, and then expanded to cover the entire world. It is my view also that no historical system that ever existed before can be plausibly seen as operating on the principle of structural priority to the *ceaseless* accumulation of capital...The 'modern world-system' (or the 'capitalist world-economy') is merely one system among many. Its peculiar feature is that it has shown itself strong enough to destroy all others contemporaneous to it.

Immanuel Wallerstein, 'World System versus World-Systems,' in Andre Gunder Frank and Barry K. Gills (eds), *The World-System: Five Hundred Years or Five Thousand?* (New York: Routledge, 1993), 292–6 at 293.

¹⁰⁶ Immanuel Wallerstein, 'The Inter-State Structure of the Modern-World System,' in Steve Smith, Ken Booth and Marysia Zalewski (eds), *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), 87–107 at 87–8. Ironically, World-Systems Analysis accords well with certain conceptualisations of the 'Grotian Heritage'. In Bull's formulation:

The Grotian tradition describes international politics in terms of a society of states or international society. As against the Hobbesian tradition, the Grotians contend that states are not engaged in a simple struggle, like gladiators in an arena, but are limited in their conflicts with one another by common rules and institutions. But as against

Economy establishes the necessary material(ist) preconditions for the emergence of a global polity which, precisely because it is an international 'community' of legal personalities, demands the correlative emergence of an institutionalised set of juro-political precepts: *ubi societas, ibi jus*.¹⁰⁷

We are thus forced, once again, to reconsider Braudel's seminal notion of the geo-historical; Braudel, who actually authored the term Capitalist World-Economy, defined it in the following manner.

Weltwirtschaft, a world-economy, a self-contained universe. No strict and authoritarian order was established, but the outlines of a coherent pattern can be discerned. All world-economies for instance recognize a centre, some focal point that acts as a stimulus to other regions and is essential to the existence of the economic units as a whole.¹⁰⁸

The employment of spatial imagery—'centre', 'focal point', 'regions', 'units'—is absolutely essential to Braudel's purpose. The master sign of the World-Economy is *spatiality* itself; 'geographical space as a source of explanation affects all historical realities, all spatially defined phenomena: states, societies, cultures and economies'.¹⁰⁹ Following Braudel, and in a manner strikingly reminiscent of Deconstruction, World-Systems Analysis espouses a thoroughly anti-essentialist

the Kantian or universalist perspective the Grotians accept the Hobbesian premise that sovereigns or states are the principal reality in international politics; the immediate members of international society are states rather than individual. International politics, in the Grotian understanding, expresses neither complete conflict of interest between states, nor complete identity of interest; it resembles a game that is partly distributive but also partly productive. *The particular international activity which, on the Grotian view, best typifies international activity as a whole is neither war between states, nor horizontal conflict cutting across the boundaries of states, but trade—or, more generally, economic and social intercourse between one country and another.*

Hedley Bull, *The Anarchical Society*, 2nd edn (New York: Columbia University Press, 1995), 25–6. Emphasis added.

- 107 Hedley Bull and Adam Watson, 'Introduction', in id. (eds), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), 1–9 at 1:

By an international society we mean a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements.

See Carr, *The Twenty Year's Crisis 1919–1939: An Introduction to the Study of International Relations*, 177 and 178: 'No political society can exist without law... [and] law cannot exist except in a political society... International Law is a function of the political community of nations.'

- 108 Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, 2 vols, i (London: Fontana/Collins, 1972), 387.
- 109 Fernand Braudel, *Afterthoughts on Material Civilization and Capitalism* (Baltimore: Johns Hopkins University Press, 1977), 20.

anti-essentialist pluralisation of Time/Space or, employing Wallerstein's nomenclature, *TimeSpace*. For Braudel and the *Annales* School, History is the 'science' of Temporality.¹¹⁰ All historical writing is pre-occupied with 'breaking down time past, choosing among its [multiple] chronological realities according to more or less conscious preferences and exclusions.'¹¹¹ History, precisely because it is nothing other than a form of writing, or *écriture*, inevitably results in the fragmentation or 'breaking down' of History/Time into multiple and qualitatively distinct levels—geographical time, social time, and individual time. History is

the dialectic of duration as it arises in the exercise of our profession, from our repeated observations...nothing is more important, nothing comes closer to the crux of social reality than this living, intimate, infinitely repeated opposition between the instant of time and that time which flows only slowly...this plurality of social time.¹¹²

Braudel's self-reflective notion of History/*Ecriture* as the progenitor of History/Time demonstrates an approach to historical knowledge that is discursive in nature. The notion that History/Time demands a multi-chronological schema directly leads to the concomitant 'breaking down' of Social Space: as Time is both qualitative and multiple, then each 'social reality' that exists is governed by a particular temporal 'flow' that differentiates its respective historical properties.

Below these small waves, in the domain of the phenomena of tendencies (the century-long tendencies of economics) there stretches with almost invisible ups and downs, a history which unravels only slowly, and by that token only slowly reveals itself to our gaze. It is this which, in our imperfect language, we call by the name of *histoire structurale* ('structural history'), less in opposition to the history of events (*evenementielle*) than to the history of conjunctures (*conjuncturale*), to relatively brief waves.¹¹³

The qualitative characteristics of any given historical occurrence is governed by the rate of the temporal flow through which it manifests itself. World-Systems Analysis has seized upon this insight and has thoroughly appropriated Braudel's notion of the irreducible plurality of 'social times, yielding the hybrid concept of TimeSpace. This linked compound 'reflects the view that for every kind of social time, there exists a particular kind of social space. Thus, time and space in social science should not be thought of as separate, measured separately, but as irrevoc-

110 'History is a dialectic of the time span: through it, and thanks to it, history is a study of society, of the whole of society, and thus of the past, and thus equally of the present, past and present being inseparable.' Braudel, 'History and Sociology', 69.

111 Braudel, 'History and the Social Sciences', 27.

112 Ibid. 26.

113 Fernand Braudel, 'Toward a Historical Economics', in id., *On History* (Chicago: The University of Chicago Press, 1980), 83-90 at 87.

cably linked into a number of combinations.¹¹⁴ A vital insight into the historical nature of ‘the Grotian Moment’ can be gained if we undergo a ‘self-reflective’ turn of our own and auto-apply Braudel’s insights into History as Time/Writing. The Title of this book can be ‘broken down’ into the corresponding categories of TimeSpace. The era of the textual production of the Grotian juvenilia, ‘*De Indis* of Hugo Grotius’, which occurred ‘c. 1600-1619’, constitutes the history of ‘the event’, *histoire evenementielle*. Accordingly, it requires some degree of biographical excursus in order to actually write it; ‘Traditional history is concerned with the short time span of biography, of the event. It is not the sort of time which is of any interest to economic or social historians.’¹¹⁵ ‘Dutch Hegemony’ signifies an intermediate temporal flow, equivalent to the history of ‘the conjuncture’, *histoire conjuncturelle*. Finally, ‘the Early Modern World-System’ clearly inhabits the domain of the history of ‘the structure’ (*histoire structurale*), the long wave of temporal flow, which is itself the qualitatively distinct TimeSpace domain of *la longue duree*. By ‘writing’ all three parallel chronologies, by transversing all three waves at tactically specific junctures, I should be able to produce a coherent—that is, a reasonably unified—work.

In fact, the three different time spans which we can discern are all interdependent: it is not so much time which is the creation of our own minds, as the way in which we break it up. These fragments are reunited at the end of all our labours. The *longue duree*, the conjuncture, the event all fit into each other neatly and without difficulty for they are all measured on the same scale.¹¹⁶

Neither an event nor a conjuncture, the Modern World-System exists solely within the plane of structural history, *la longue duree*. The alleged ‘triumph’ of Grotian Rationalism may now be seen to constitute a mere event within a much wider structural occurrence. The ‘precarious balance’ of the Westphalian System signifies a ‘long wave’ transition to the Modern World-System, the transforma-

114 Wallerstein, *World-Systems Analysis*, 98. For World-Systems Analysis,

time and space—or rather that linked compound time/space—are not unchanging external realities that are somehow just there, and within whose features social reality exists. TimeSpaces are constantly evolving constructed realities whose construction is part and parcel of the social reality we are analysing. The historical systems within which we live are indeed systemic, but they are historical as well. They remain the same over time yet they are never the same from one minute to the next. This is a paradox, but not a contradiction. The ability to deal with this paradox, which we cannot circumvent, is the principal task of the historical social sciences.

Ibid. 22.

115 Braudel, ‘Toward a Historical Economics’, 86.

116 Braudel, ‘History and the Social Sciences’, 48.

tion of a regional European sub-system (or, the *European* world economy¹¹⁷) to a truly global World-Economy.¹¹⁸

In the late fifteenth and early sixteenth century, there came into existence what may be called a European world-economy. It was not an empire...it was a kind of social system the world has not really known before and which is the distinctive feature of the Modern World System. It was an economic but not a political unity... it is a *world economy* because the basic linkage between the parts of the system is economic.¹¹⁹

It can now be seen that the Grotian Heritage analogically corresponds to *structural power*, while the binary concepts of both the Modern World-System and World-Economy analogically correspond to *relational power*. World-Systems Analysis, therefore, manages to offer both a more persuasive account of the historical evolution of international politics (the praxis 'base' of International Law) than either of the two mainstream doctrines of Realism and Liberalism, while simultaneously obviating the most serious shortcomings of both. Against Realism, World-Systems Analysis refuses to hypostasise the Nation-State as the sole legitimate actor within trans-national space; as a rigorously historicist form of deconstructive reasoning, the World-System expressly assumes a multi-dimensional polity of agencies, including, most controversially, international *classes*.

In its treatment of class as a trans-national agency, World-Systems Analysis exhibits a pronounced similarity to certain forms of 'soft' or 'open' neo-Marxism, such as that of David Harvey. Both schools mark a considerable advance beyond orthodox neo-Marxism which, traditionally, had difficulty in accounting for the intractability of statist forms within the Capitalist World-Economy.¹²⁰ Not without some degree of difficulty, World-Systems Analysis renders the development of the Capitalist World-Economy coeval with the emergence of an early, or 'primitive', inter-state system at some point during the 'long' 16th century.¹²¹ Most critical here is the assumption that the World-System of States is identical to a specifically capitalistic form of World-Economy; the 'interstate system of

117 A regional world system is not truly global, merely 'larger than any juridically-defined political unit.' Wallerstein, *The Modern World System I*, 15.

118 See below, this Chapter.

119 Immanuel Wallerstein, *The Modern World-System II: Mercantilism and the Consolidation of the European World-Economy, 1600–1750* (New York: Academic Press, 1980), 15.

120 As Fred Halliday put it, orthodox Marxism fails to answer the question as to 'why, if there is a world-economy in which class interests operate trans-nationally, there is a need for states at all. What, in other words, is the specificity and effectivity of distinct states within a single economic totality?' Cited in Hannes Lacher, 'Putting the State in Its Place: The Critique of State-Centrism and Its Limits,' *Review of International Studies*, 29 (2003), 521–41 at 538.

121 For a more detailed discussion of the historical emergence of the first phases of the Modern World-System, see below, Chapter Three.

unequally powerful and competing states is the political body of Capitalism.¹²² Thus, for both World-Systems Analysis and 'open Marxism,' the justifiably infamous 'capitalistic bourgeoisie' emerges unto the stage of World-History in both a national and trans-national capacity, with the State serving as 'a territorial framework within which the molecular processes of capital accumulation operate.'¹²³

Indeed, World-Systems Analysis is adamant in representing the bourgeoisie as the bearers of multiple historical identities, both bound and unbound spatially; 'from its inception, the world capitalist economy was never just a vast commodity market. It involved, and involves, the commodification of labour-power in different regional settings.'¹²⁴ As the World-Economy evolves as the capitalistic variant of the Modern World-System, the entire panoply of social forces that were both perquisite to and the product of the emergence of the bourgeois polity are extended to the TimeSpace domain of 'the long wave.'

Capitalism *does* constitute a world economy and society that transcends the territorial state (without the state therefore being merely a functional or administrative sub-unit of the larger world-system). As a result, the world market and society cannot be understood directly in terms of the economic competition between capital and firms and the social conflicts between capital and labour over property, production and distribution. Class identity and interests always have a trans-national dimension in capitalism, but the territoriality of political authority means that particular amalgamations of class interests and 'national interests' will be of decisive importance in shaping the historical geography of capitalism in any given conjuncture. This valorizes the territorial state as the basic spatial point of reference.¹²⁵

Nevertheless, both World-Systems Analysis and 'open' Marxism must answer a decisive objection concerning the relationship between territoriality and Capitalism: that a recognisably 'early' modern inter-state system emerged centuries prior to the instauration of Capitalism. Simply put, the 'territoriality of capitalist statehood may be better understood as a *historical legacy* from the precapitalist period.'¹²⁶ For open Marxists such as Lacher this apparently insurmountable

122 Chris Chase-Dunn, *Global Formation: Structures of the World-Economy* (Oxford: Basil Blackwell, 1989), 107.

123 David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2003), 89. 'The state, in short, is the political entity, the body politic, that is best able to orchestrate these processes. Failure to do so will likely result in a diminution of the wealth and power of the state.' Ibid. 32.

124 Anthony Giddens, *The Nation-State and Violence* (Cambridge: Polity Press, 1985), 278.

125 Hannes Lacher, 'International Transformation and the Persistence of Territoriality: Toward a New Political Geography of Capitalism,' *Review of International Political Economy*, 12/1 (2005), 26–52 at 39–40.

126 Lacher, 'Putting the State in Its Place', 538. One of the standard objections to World-Systems Analysis is its perceived difficulty in formulating a comprehensive theory

objection compels a fundamental re-consideration of the spatial requirements of Capitalism; the real historical problem 'has little to do with the nature of capital itself, and all with the way in which capital came into existence': the bourgeois capture of the early Modern Absolutist State. Capitalist statehood 'has been based on territorial sovereignty not because capital, in its early stages of self-realisation, required a national state, but because of the historical prefiguration of capitalist modernity by pre-capitalist forms of territoriality.'¹²⁷ The crucial point is that

The political space of capitalist modernity is fragmented along territorial lines not because of the nature of capital, nor as a result of the functional requirements of early (mercantile) capitalism. Capitalist world society is structured by an international system because it was born in the context of a pre-existing system of territorial states; this territoriality was reproduced even while the social relations of sovereignty were fundamentally transformed [by the bourgeois 'capture' of the Absolutist State]. The conceptualisation of the international relations of capitalist modernity thus has to start from the recognition that the modern international system is not of capitalist origins, yet has had (and continues to have) a profound impact on all aspects of the social, political, and economic reproduction of capital.¹²⁸

Apart from an empirical counter-objection that may be made that World-Systems Analysis does postulate inter-state territoriality as a factual pre-condition for Capitalism, it is remarkable to note how many of 'tell-tale signs' of deconstructive suspicion are present within this passage. What is most suspect from the perspective of both Deconstruction and Post-Colonialism is that the neo-Marxist resolution of the dilemma is predicated upon a series of essentialist dichotomies: Public/Private; Politics/Economics; Modern/Pre-Modern; and, most important, Capitalist/Pre-Capitalist. The essentialisation of historical structures, particularly those underlying the origins of European imperialism, is antithetical to both the deconstructive and Post-Colonialist projects as it implicitly replicates both Euro-centrism and Universalism.¹²⁹ This, in turn, would appear to mitigate

for the material origins of Capitalism and the subsequent Modern World-System. Giovanni Arrighi, 'Capitalism and the Modern World-System: Rethinking the Non-debates of the 1970s', *Review*, XXI/1 (1998), 113–29, *passim*.

127 Lacher, 'International Transformation', 44.

128 Lacher, 'Putting the State in Its Place', 539.

129 This is particularly so with Post-Structuralism. An essentialising epistemological proposition underlies Marx's use of categories like 'bourgeois' and 'prebourgeois' and 'precapital'. The prefix *pre* here signifies a relationship that is both chronological and theoretical. The coming of the bourgeois or capitalist society... gives rise to the first time to a history that can be apprehended through a philosophical and universal category, 'capital'. History becomes, for the first time, *theoretically* knowable. All past histories are now to be known 'theoretically', that is from the vantage point of this category, that is in terms of their differences from it.

Chakrabarty, 'Postcoloniality and the Artifice of History', 3. For a decisive critique of Marxism as Euro-centric essentialism, most particularly through its employment of

against the feasibility of an interpretative approach that combined Deconstruction with World-Systems Analysis, as the latter is quite specific in its understanding of the TimeSpace origins of the global capitalist society.

There are three possible ways forward from the apparent impasse. Firstly, the responsive open Marxist, like the anti-essentialising World-Systems analyst, may use this opportunity to call for even greater dialectical reflexivity, subjecting himself or herself to a renewal of the Bolshevik ideal of perpetual 'self-criticism'; the correct deployment of dialectical reasoning will subvert the logic of essentialisation.¹³⁰ The second strategy, at variance with full dialectical rigor, is to abolish any cognisable distinction between Politics and Economics and undertake what from a Marxist perspective is the counter-intuitive collapse of Economics into Politics. Given Marxism's ineluctable slide into determinism, the alternative strategy here is to ontologically privilege the political over the economic, with Politics, not Economics, now standing as the 'ultimate secret' of Capitalism; the 'relations of production' themselves 'take the form of particular juridical and political relations—modes of domination and coercion, forms of property and social organisation—which are not mere secondary reflexes, nor even just external supports, but *constitutive* of these production relations.'¹³¹

its most noxiously Euro-centric construct the 'Asiatic Mode of Production', see Spivak, *A Critique of Postcolonial Reason*, 71–111. 'The Asiatic Mode of Production... is the name and imaginary fleshing out of a difference in terms that are consonant with the development of capitalism and the resistance *appropriate* to it as "the same"'. Ibid. 79.

- 130 Harvey is a good example of this approach.

The fundamental point is to see the territorial and the capitalist logic of power as distinct from each other. Yet it is also undeniable that the two logics intertwine in complex and sometimes contradictory ways. The literature on imperialism and empire too often assumes an easy accord between them: that political-economic processes are guided by the strategies of state and empire and that states and empires always operate out of capitalistic motivations. In practice the two logics frequently tug against each other, sometimes to the point of outright antagonism... The relation between the two logics should be seen, therefore, as problematic and often contradictory (that is, dialectical) rather than as functional or one-sided. The dialectical relation sets the stage for an analysis of capitalist imperialism in terms of the intersection of these two distinctive but intertwined logics of power. The difficulty for concrete analyses of actual situations [*l'histoire evenementielle*] is to keep the two sides of this dialectic simultaneously in motion and not to lapse into either a solely political or a predominantly economic mode of argumentation.

Harvey, *The New Imperialism*, 29–30.

- 131 Ellen Meiskins Wood, *Democracy Against Capitalism: Reviving Historical Materialism* (Cambridge: Cambridge University Press, 1995), 27. In this manner, an 'open' Marxist like Harvey is able to reconcile soft Marxism with the geo-historical TimeSpace dimensions of World-Systems Analysis.

The container [of spatially and temporally situated productive relations] that is the territorial state is, in short, often captured by some dominant regional interest or coalition of interests within it, that is, some other region arises to counter or supersede it. These

The crucial phrase 'ultimate secret', however, gives the game away; it betrays the logic of the dangerous supplement, infusing a counter-essentialising discourse that would strive to replace the metaphysical totality of Economics with the metaphysical totality of Politics. This leads us to the third and most philosophically honest stratagem: to openly acknowledge that the prioritisation of structure actively carries with it the risk of a slide into a least partial essentialisation. World-Systems Analysis, as a form of historical sociology, is a potentially essentialising discourse insofar as it prioritises structure. However, it is this selfsame structuralism that makes World-System Analysis a viable form of historical sociology in the first instance; indeed, without stating the claim too strongly, it constitutes the systematic translation of the foundational concepts of Braudelien historiography into the form of a practical 'research agenda'. This has been expressly acknowledged by a number of Post-Colonial scholars, particularly those affiliated with the 'subaltern studies' project of the 1990s.¹³² Deploying the term 'foundational' in place of the Post-Structuralist concept of 'meta-narrative', Prakash posits the way towards a new discursive practice grounded upon a 'sustained creative tension'¹³³ as a way out of the structural/essentialist dilemma.

When I call this [sociological] form of historical writing foundational, I refer to its assumptions that history is ultimately founded in and representable through some identity—individual, class, or structure—which resists further decomposition [deconstruction?] into heterogeneity. From this point of view, we can do no better than document

shifts of influence from one region to another, from one scale to another, are precisely what the passive revolutions deriving from the molecular processes of endless capital accumulation typically accomplish. But the general principle is clear: regionality crystallizes according to its own logic out of the molecular processes of capital accumulation in space and time. In due course the regions thus formed come to play a crucial role in how the body politic of the state as a whole, defined solely according to some territorial logic, positions itself.

Harvey, *The New Imperialism*, 105.

- 132 See Young, *Postcolonialism*, 337–59. Mignolo has recognised a number of precise similarities between subaltern studies and his own concept of the modern/colonial world-system. The latter is

an epistemic standpoint or locus of enunciation that emerged and evolved in Latin American scholarship and during the Cold War period that looked at modernity from the perspective of coloniality, that is from the perspective of Creole/mestizo/European immigrant consciousness whose history unfolded at the receiving end of the colonial experience... South Asian subaltern studies... is a comparable case that, interestingly enough, emerged during the same period and for similar reasons. What South Asian subaltern studies achieved was to establish a project, an epistemic standpoint that allowed scholars to build on the perspective of the subaltern population, those who have been denied historical agency in the history of India.

Walter D. Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization* (Ann Arbor: The University of Michigan Press, 1995), 436.

- 133 Ibid. 416.

these founding subjects of history, unless we prefer the impossibility of coherent writing amidst the chaos of heterogeneity.¹³⁴

Post-Colonialism's overriding, or 'foundational', commitment to oppositional politics sets precise limits to its appropriation of Deconstruction. At this point we are forced to re-consider Mignolo's seminal concept of 'border thinking', 'thinking from dichotomous concepts rather than ordering the world in dichotomies'.¹³⁵ This may, in fact, prove to be the most fruitful approach to discursive convergence; 'All systems are historic, and all of history is systematic'¹³⁶... World-Systems Analysis is indeed a grand narrative.¹³⁷ For Wallerstein, to be against 'the concept of timeless [essential] structures does not mean that (time-bound) structures do not exist'.¹³⁸ Rather, the World-System analyst, invested with deconstructive insight and sympathetically committed to the Post-Colonial project, must intellectually operate within a state of highly (self-) critical philosophical self-reflexivity and successfully navigate the rhetorical migrations between 'icy essentialism' and 'chaotic heterogeneity'. This yields a strategic 'double movement' for the scholar attempting World-Systems analysis to circumvent a counter-essentialist 'anti-Euro-centric Euro-centrism'.

To be a non-Orientalist means to accept the continuing tension between the need to universalise our perceptions, analyses, and statements of values and the need to defend their particularist roots against the incursion of the particularist perceptions, analyses, and statements of values coming from others who claim that they are putting forward universals.¹³⁹ We are required to universalise our particulars and particularize our universals simultaneously and in a kind of constant dialectical exchange, which allows us

134 Gyan Prakash, 'Writing Post-Orientalist Histories of the Third World: Perspectives from Indian Historiography', *Comparative Studies in Society and History*, 32/2 (1990), 383–408 at 396. This sentiment has been echoed by Said. 'The grand narratives remain, even though their implementation and realization are at present in abeyance, deferred or circumvented. This crucial difference between the urgent historical and political imperatives of post-colonialism and post-modernism's relative detachment make for altogether different approaches and results, although some overlap between them... does exist.' Edward W. Said, *Orientalism* (London: Penguin Books, 2003), 351; see *ibid.* 350–4.

135 See above, this Chapter.

136 Wallerstein, *European Universalism*, 83.

137 Wallerstein, *World-Systems Analysis*, 12.

138 *Ibid.* 21.

139 Wallerstein, *European Universalism*, 39:

When we return to grand narratives, we face two different questions it seems to me. One is to assess the world, I would say the world-system, in which we are living, and the claims of those in power to be party to, and implementers of, universal value. The second is to consider whether there are such things as universal values, and if so, when and under what conditions we might come to know them.

to find new syntheses that are then of course instantly called into question. It is not an easy game.¹⁴⁰

But it *is* a game. In several crucial respects, the de-hyphenated 'world system' variant of Frank and Gills would appear to be more readily compatible with Post-Colonialism's anti-Euro-centric agenda; both scholars radically disperse capitalist relations, premised upon a Circulationist rather than on a Productionist model, throughout TimeSpace, resulting in a Capitalist World-Economy of a 5,000 year duration rather than Wallerstein's more circumscribed 500.¹⁴¹ Yet it is this very ability to encapsulate the historical emergence of the Capitalist World-Economy within a particular set of conjunctures within the World-System—the European penetration and subsequent incorporation of all other regional systems of the world¹⁴²—is precisely what enables World-System Analysis to maintain its consistency with the Braudelien schema of pluralistic social times.

Note the hyphen in world-system and its two subcategories, world-economies and world-empires. Putting in the hyphen was intended to underline that we are not talking about systems, economies, empires *of the* (whole) world, but about systems, economies, empires *that are* a world (but quite possibly, and indeed usually, not encompassing the entire globe). This is a key initial concept to grasp. It says that in 'world-systems' we are dealing with a spatial/temporal zone which cuts across many political and cultural units, one that represents an integrated zone of activity and institutions which obey certain systemic rules.¹⁴³

140 Ibid. 48 and 49.

141 Wallerstein, *World-Systems Analysis*, 14–19. World-System's preference for Circulationism rather than Productionism constitute's one of neo-Marxism's strongest grounds of criticism. The issue of Circulationism as a sign of Holland's modernity and capitalistic status within the World-System will be addressed in Chapters Five and Eight.

142 See below, Chapters Three and Eight.

143 Ibid. 16–17. Wallerstein's paradigm is, of course, the 'mirror-image' or 'inverted double' of Frank and Gills.

In so far as there has been a 'world system' in world economic history, it has (always) been predominantly 'capitalist'. The world system, in fact, is not a creation merely of trade, but of 'capital accumulation'. Capital accumulation has existed on a 'world scale' for several millennia, not several centuries. It is this central contention that constitutes the 'continuity thesis'... the starting point for world system analysis of 'capital and power in the process of world history'... and of the changing relationship between the world economy and the inter-state system(s). World System analysis differs from Wallersteinian world-system analysis... in a number of highly significant ways... The essence of the disagreement surrounds the contrasting interpretations given to the notion 'ceaseless accumulation', which to Wallerstein is the *differentia specifica* of modern capitalism, whilst to Frank and [Gills], it is in fact a *constant* feature of the world system... The most significant changes and ruptures in world history are consequently viewed quite differently, being less focused on the idea of 'transition to capitalism' (especially

Apart from the inherent heterogeneity of TimeSpace, the other two vital elements to keep in mind when evaluating the anti-essentialist credentials of World-Systems Analysis are historical contingency and *in*-determinism. Eschewing the Marxist prioritisation of endogenous modes of production, which is itself discursively tantamount to the essentialising of Productionism, the main focus of concern is not with the assumed 'originary' of Capitalism but rather with the heterogeneous conditions governing the instauration of the Capitalist World-Economy. The 'main unit of analysis' geo-historically located within the long-wave of the Modern World-System are the multiple conjunctions that collectively enabled the assimilation of all prior autonomous regional economies—or 'sub world systems'—into the hegemonic 'core zone' of the western European inter-state system, a long-wave phenomenon that clearly commenced sometime during the 'long' 16th century. The foundation of the structural Capitalist World-Economy was neither wholly endogenous nor wholly exogenous, but a transverse series of specific historical conjunctures and events—political, military, commercial, and, in the case of Grotius, juridical—each short to medium term in occurrence but long-term in effect. This insight may well prove to be the key to the resolution of the entire dilemma: the correct understanding of the Modern World-System as a phenomenon of qualitatively unique structural time; the existence of global Capitalism is itself of *la longue duree*.¹⁴⁴ The true problematic of World-Systems Anal-

as uniquely European) and more concerned with the long 'global history' of capital and the shifting locus of capital accumulation and power over time and space.

Barry K. Gills, 'World System Analysis, Historical Sociology and International Relations: the Difference a Hyphen Makes', in Steven Hobden and John M. Hobson (eds), *Historical Sociology of International Relations* (Cambridge: Cambridge University Press, 2002), 141–61 at 141–42.

- 144 This irreducibility of qualitative TimeSpace to quantitative analysis seems to underlay Braudel's profound critique of Marxist historiography.

Marx's genius, the secret of his long sway, lies in the fact that he was the first to construct true social models, on the basis of a historical *longue duree*. These models have been frozen in all their simplicity by being given the status of laws, of a preordained and automatic explanation, valid in all places and to any society. Whereas if they were put back within the ever-changing stream of time, they would constantly reappear, but with changes of emphasis, sometimes over-shadowed, sometimes thrown into relief by the presence of other structures which would themselves be susceptible to definition by other rules and thus by other models. In this way, the creative potential of the most powerful social analysis of the last century has been stymied. It cannot regain its youth and vigour except in the *longue duree*. Should I add that contemporary Marxism appears to me to be the very image of the danger lying in wait for any social science wholly taken up with the model in its pure state, with models for model's sake?

Braudel, 'History and the Social Sciences', 51. Naturally, this is anathema to orthodox neo-Marxism. See, for example, Teschke's dismissive account of Braudel's 'erroneous and fundamentally ahistorical conception of capitalism' as constituting a 'series of impressionistic insights'. Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (London: Verso, 2003), 129–33 at 132. Of course, if Braudel is correct in his speculations concerning 'the long wave', then an

ysis, therefore, is not the Marxist one of 'correctly' delineating the essentialised boundaries between Capitalism and pre-Capitalism, but of undertaking the most radical and systemic re-conceptualisation of the world-historical significance of European colonialism possible. This, in turn yields World-System Analysis' single greatest contribution to Critical Theory: that global Colonialism—'the modern/colonial world system'— is the very first stage of world Capitalism.¹⁴⁵

In unyielding opposition to Liberalism, that most insidious form of Euro-centric Universalism, World-Systems Analysis unconditionally rejects the ideological mystification of 'Law as Justice as Fairness'; interstate relations are essentially competitive and exploitative. On a 'deeper'—and, therefore, a more 'sinister' level—World-Systems Analysis abjures altogether the normative Holy Grail of Liberalism, the 'withering away' of Statism as the necessary precondition for the global emergence of 'humane governance'.¹⁴⁶ Intrastate conflict, the arena of non- and sub-state actors, can be as irrepressibly violent and exploitative as the most extreme forms of State rivalry,¹⁴⁷ with non-territorial actors exhibiting the realist tendencies of aggressive self-aggrandisement, e.g. Terrorism, Piracy, wars of National Liberation, paramilitaries, trans-national criminal cartels, slave trafficking, weapons smuggling, narco-economies, money laundering, and people smuggling.¹⁴⁸ When governed by the appropriate conjunctures, both local and global, such sub-state groups may coalesce into recognisable 'social movements',¹⁴⁹

'impressionistic' history is precisely what we should expect—something that Teschke never even considers.

145 Mignolo, *Local Histories/Global Designs*, 3–45. See also Harvey, *The New Imperialism*, 42–62. Arendt has made a similar observation. The European imperialism of the 19th century 'was the first stage in the political rule of the bourgeoisie rather than the last stage of capitalism.' Hannah Arendt, *Imperialism* (New York: Harcourt Brace & Company, 1968), 18.

146 Regarding 'Humane Governance', see Richard Falk, 'Humane Governance for the World: Reviving the Quest', *The Review of International Political Economy*, 7/2 (2000), 317–34, *passim*.

147 'NGOs, which, precisely because they are not run directly by governments, are assumed to act on the basis of ethical or moral imperatives.' Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000), 36.

148 See Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (London: Zed Books, 2001), 161–201, *passim*.

149 According to Rosenau, social movements

are perhaps the quintessential case of nascent control mechanisms that have the potential to develop into institutionalised instruments of governance... More often than not, social movements are organized around a salient set of issues—like those that highlight the concerns of feminists, environmentalists or peace activists—and as such they serve trans-national needs that cannot be filled by national governments, organized domestic groups, or private firms.

James N. Rosenau, 'Governance in the Twenty-First Century', *Global Governance*, 1 (1995), 13–43 at 24. Typically, Rosenau regards social movements as the embodiment of progressive politics. In Chapter Seven we shall demonstrate how Trans-National

which, when combined with an appropriate form of oppositional politics, can then evolve into fully developed anti-systemic movements within the Modern World-System.

Anti-Systemic movements will be discussed in greater detail in Chapter Seven; suffice for now is the necessary linkage between anti-systemic movements and Post-Colonialist discourse, with the former representing the concrete historical embodiment of the 'border thinking' of the latter. 'The point about antisystemic movements is that they often elude the traditional categories of nation, state and law. They articulate new ways to experience life, a new attitude to time and space, a new sense of history and identity.'¹⁵⁰ The highly revealing convergences between anti-colonialist National Liberation Movements and the Post-Structuralist critique of 'Post-Coloniality'¹⁵¹ are all clearly on display in the seminal Post-Colonialist Text, *The Wretched of the Earth* by Frantz Fanon; significantly, Wallerstein himself was one of the very first 'western' academics to trumpet Fanon's work in the 1960s and 1970s.¹⁵² Eschewing the orthodox categories of dialectical historical materialism—'Marxist analysis should always be slightly stretched every time we have to do with the colonial problem'¹⁵³—Fanon conceptualises anti-colonialist

Criminal Cartels, in alliance with National Liberation Movements, are fully capable of meeting all of the definitional requirements of a social movement.

150 Joseph A. Camilleri, 'Rethinking Sovereignty in a Shrinking, Fragmented World,' in R.B.J. Walker and Saul H. Mendlovitz (eds), *Contending Sovereignities: Redefining Political Community* (Boulder: Lynne Reinner, 1990), 35.

151 Defined by Young as 'the economic, material and cultural conditions that determine the global system in which the postcolonial nation is required to operate—one heavily weighted towards the interests of international capital and the G-7 powers.' Young, *Postcolonialism*, 57.

152 Wallerstein, *The Uncertainties of Knowledge*, 85–6. For good discussions of the Post-Structuralist significance of Fanon, see Young, *Postcolonialism*, 274–83 and Homi K. Bhabha, *The Location of Culture* (New York: Routledge, 1994), 40–65.

153 Frantz Fanon, *The Wretched of the Earth* (Harmondsworth: Penguin Books, 1985), 31.

This 'slight stretching' has to be understood as a basic destabilization of the Euro-centric orientation of the 'materialist conception of history'. It should be noted that 'slight' as this 'stretching' may be, it of necessity dislocates and rejects the symmetry of Marx's metaphysical presuppositions, as evidenced by the basic direction and tenor of Fanon's thought as a whole.

Tsenay Serqueberhan, 'Karl Marx and African Emancipatory Thought: A Critique of Marx's Euro-Centric Metaphysics', *Praxis International*, 10:1/2 (1990), 161–81, at 168. For Serqueberhan, 'Marx's Euro-centric orientation is *not* an extrinsic or accidental element of his thought but is the heart and substance of his "materialist conception of history"'. This is due primarily to Marx's grounding in Hegelian Metaphysics, which he replicates, even if only unconsciously.

For Hegel, world history—from which he held Africa was excluded—is the development of the *Idea* of freedom as it moves from the Orient to the Occident. For Hegel's *Idea*, Marx substitutes an abstract notion of humanity whose 'development'—through the class struggle—is then the objective unfolding of world history... it is this specula-

struggle in terms remarkably evocative of Deconstruction's radically anti-dialectical dichotomy of Self/Other. Declaring that the 'colonial world is a Manichaeian world',¹⁵⁴ Fanon reduces the antinomy of Coloniser/Colonised to one of unmitigated and non-negotiable violence. The identity of both agent's is nothing more than the act of the violent negation of the other, superseding the mutual recognition—and, hence, affirmation—of Hegel's Master/Slave; both actors acquire historical identity by no other means than violence alone.

The [Colonizer's] repressions [of the Colonized], far from calling a halt to the forward march of national consciousness, urge it on. Mass slaughter in the colonies at a certain stage of the embryonic development of consciousness increases that consciousness, for the hecatombs are an indication that between oppressors and oppressed everything can be solved by force...Violence alone, violence committed by the people, violence organized and educated by its leaders, makes it possible for the masses to understand social truths and gives the key to them.¹⁵⁵

tive schema that compels Marx to support and present an ethical-metaphysical justification for European colonialist expansion.

Ibid. 162 and 164. The Marxist 'materialist conception of history' is Euro-centric precisely to the degree that it bears the signs of Universalism, that is Hierarchy and Teleology. Ibid. 169–78. For his part, Hegel is deeply imbricated in the foundational legitimization of Euro-centric Universalism. Serequeberhan presents a compelling picture of Hegel as 'stealthily suggesting colonialism as the only viable solution to the fundamental contradictions that emerge from the dialectic internal to civil society and the state', namely the forcible resettlement of impoverished surplus populations; as a result, Hegel 'presents a systematic metaphysical-ethical exposition and justification for European colonialism.' Tsenay Serequeberhan, 'The Idea of Colonialism in Hegel's Philosophy of Right', *International Philosophical Quarterly*, 39/3 (1989), 301–18 at 301 and 302.

154 Ibid. On the one hand, Fanon is drawing our attention in a new way towards an old problem within Critical Theory—Marxism's chronic failure to formulate an adequate theory of Colonialism, Racism, and Nationalism. He achieves this through an ironic commentary upon the Manichaeian divisions between 'black and white'. As Young points out, 'it is here, in the reconstitution of class dynamics, that Fanon makes his most substantial revision of Marx, shifting class conflict into the divisions between colonizer and colonized.' Young, *Postcolonialism*, 229. See also Bhabha, *The Location of Culture*, 40–65 on the parallels between Fanon's 'Manichaeian delirium' and Self/Other and, especially, 61–2 for the un-dialectical nature of the Manichaeian dichotomy.

155 Fanon, *The Wretched of the Earth*, 56 and 118. 'Violence makes the subject double, doubly subject, simultaneously subject and object, an outsider to his or her own being.' Young, *Postcolonialism*, 294. It is difficult not to detect an element of *frisson* within this passage, the longed-for dialectical 'synthesis' at fundamental odds with the negating ontology of annihilation. As Bhabha correctly intuits, it is as if Fanon is fearful of his most radical insights: that the politics of race will not be entirely contained within the humanist myth of man or economic necessity or historical progress,

Historical agency created out of nothing other than annihilating violence is highly evocative of Derrida's observations concerning the radically 'un-self-grounded' status of Law: 'a violence without a ground.' For both Derrida and Fanon, violence in and of itself can serve as the constitutive ground, or arche-trace, of Being:¹⁵⁶ the 'violence of the colonial regime and the counter-violence of the native balance each other and respond to each other in an extraordinary reciprocal homogeneity.'¹⁵⁷ Fully consistent with Derrida's definition of History—an 'infinite passage through violence'¹⁵⁸—the anti-dialectical antinomies of Self/Other yield a reversibility, or iterability, of cultural identities.

The settler's work is to make even dreams of liberty impossible for the native. The native work is to imagine all possible methods for destroying the settler. On the logical plane, the Manichaeism of the settler produces a Manichaeism of the native. To the theory of the 'absolute evil of the native' the theory of the 'absolute evil of the settler' replies. The appearance of the settler has meant in the terms of syncretism the death of the aboriginal society, cultural lethargy, and the petrification of individuals. For the

for its psychic effects question such forms of determinism; that social sovereignty and human subjectivity are only realizable in the order of otherness.

Bhabha, *The Location of Culture*, 61. For Fanon, a better mentor than Marx may have been Nietzsche, Junger, Schmitt, Bataille, or even de Sade. 'Violence, in many ways, is too clean and cerebral a word, too surrounded with the dignity of philosophical conceptualisation, to describe the raging, sadistic and sickening butchery of what went on in Algeria.' Young, *Postcolonialism*, 277. The thought of *The Wretched of the Earth* having been written in the manner of *The 120 Days of Sodom* or *The Accursed Share* presents a truly frightening spectacle. Employing his own terminology, Mignolo has conveyed the Nietzschean logic of the Coloniser: 'colonial discourse was one of the most powerful strategies in the imaginary of the modern /colonial world system for producing dichotomies that justified the will to power.' Mignolo, *Local Histories/Global Designs*, 337.

- 156 This perfectly underscores Fanon's departure from orthodox Marxism. 'Everything up to and including the very nature of pre-capitalist society, so well explained by Marx. Must be here thought out again.' Fanon, *The Wretched of the Earth*, 31. The anti-dialectical nature of colonialist violence entirely supersedes the interpretative categories of historical materialism.

A people's victorious fight not only consecrates the triumph of its rights; it also gives that people consistence, coherence and homogeneity. For colonialism has not simply depersonalised the individual it has colonized; this depersonalisation is equally felt in the collective sphere, on the level of social structure. The colonized people find that they are reduced to a body of individuals who only find cohesion when in the presence of the colonizing nation.

Ibid. 237.

- 157 Ibid. 69.

- 158 Jacques Derrida, *Writing and Difference*, trans. with Introduction by Alan Bass (London: Routledge & Kegan Paul, 1978), 130.

native, life can only spring up again out of the rotting of the corpse of the settler. This, then, is the correspondence, term by term, between the two trains of reasoning.¹⁵⁹

If the trans-historical constant of the 'problem' of Colonialism—its 'meta-narrative'—is the ultimate impossibility of the colony to become identical with the metropole, then Colonialism must, and can only be, an *anti*-dialectical process; the *unconditional* negation of the native by the settler is both its necessary and defining characteristic.¹⁶⁰ Not synthesis but the most radical alterity imaginable, incommensurable and incommunicable, is the master-sign of the Fanonite Text. As is so often the case with deconstructive analysis, the iterability between Self/Other irreversibly slides into the logic of the dangerous supplement: in Fanon's justifiably famous words, 'Europe is literally the creation of the Third World.'¹⁶¹ The Third World signifies Europe through its appropriation of the Nation-State via the mediatory act of anti-colonialist violence.¹⁶² Europe signifies the Third World when it internalises—or, more ironically, 'domestically imports'—this self-same colonialist violence: 'On the individual level, on the plane of human rights, what is fascism if not colonialism when rooted in a traditionally colonialist society?... Is not colonial status simply the organized reduction to slavery of a whole people?'¹⁶³

It is these sorts of linkages between Post-Colonialism and Post-Structuralism that provide the theoretical edifice we require if we are to successfully subject the 'Grotian Heritage' to the 'deconstructive turn.' Anti-Systemic movements are politically charged—that is to say 'violent'—social movements operative within the Modern World-System. Their capacity to serve as a non-State bearer of statist personality and function (or 'governance'), render them highly susceptible to a deconstructive reading. Young has quite persuasively argued the centrality of the Algerian War of Independence within the historical emergence of Deconstruc-

159 Fanon, *The Wretched of the Earth*, 73.

160 In contrast to Imperialism which does allow for the political integration of the conquered territory into a political unity, and therefore cultural identity with, the conquering homeland. For a more detailed discussion of Imperialism and Empire in terms of World-Systems Analysis, see below, Chapter Three.

161 Ibid. 81.

162 Ibid. 57 and 74:

What is the real nature of this violence? We have seen that it is the intuition of the colonized masses that their liberation must, and can only, be achieved by force... During the colonial period the people are called upon to fight against oppression; after national liberation they are called upon to fight against poverty, illiteracy and underdevelopment. The struggle, they say, goes on. The people realize that life is an unending contest.

163 Ibid. 71. 'If fascism was colonial totalitarianism brought home to Europe, then totalitarianism is always colonial, externally or internally.' Young, *Postcolonialism*, 415. In Post-Colonialist terms, the Third Reich might best be categorized as an intra-European colonialist-settler State.

tion—in its earliest phase alternatively de-noted as ‘Destruction.’¹⁶⁴ What Cixous calls ‘Algeriance’, Young labels ‘Franco-Judeo-Maghrebian Theory’—also ‘popularly known as deconstruction’—a singular ‘manifestation of that unforgettable possession’ of Algeria by France.¹⁶⁵ Positing ‘Algeriance’ as a kind of dangerous supplement,¹⁶⁶ Young conceives of Post-Structuralism as ‘a form of epistemic violence [that] always represented one echo of the violence of Algeria playing itself out in an insurrection against the calm philosophical and political certainties of the metropolis.’¹⁶⁷ For Young, Deconstruction ‘could be better characterized... as Franco-Maghrebian Theory, for its theoretical inventions have been actively concerned with the task of undoing the ideological heritage of French colonialism and with rethinking the premises, assumptions and protocols of its centrist, imperial culture.’¹⁶⁸ Deconstruction is anti-colonialist not out of political preference but of historical necessity. French colonialism serves as the arche-trace to the discursive formation of Derridean ‘destruction’; the deconstruction of ‘the many forms of centrism—logo-, phallo-, or structural—only makes sense fully in the

164 Spivak, *A Critique of Postcolonialist Reason*, 423:

In [Deconstruction’s] first appearance in 1965–1966, a series of reviews in the French [literary journal] *Cririque*, it contained the term ‘destruction’. The word owed something to Martin Heidegger... The naming of ‘deconstruction’, then, is, among other things, something like a definitive modification of a Heideggerian program. It should be remembered that Heidegger was a strong reader of Friedrich Nietzsche... in whose work also ‘destruction’ played a special part.

165 Young, *Postcolonialism*, 294. Young provides a quite remarkable list of major Post-Structuralist and/or Post-Colonialist thinkers—Fanon, Memmi, Bourdieu, Althusser, Lyotard, Cixous, Derrida—who were ‘all in or from Algeria’. Foucault spent his highly formative period of 1966–1968 in Tunisia. *Ibid.* 413–14. All of this must surely qualify somewhat Mignolo’s rather harsh assessment of Deconstruction as latently Euro-centric. ‘Postmodern criticism of modernity as well as world system analysis is generated from the interior borders of the system—that is, they provide a Eurocentric critique of Eurocentrism... [by contrast] *It is the colonial epistemic difference that calls for border thinking*’. Mignolo, *Local Histories/Global Designs*, 315.

166 Doing so places the geo-spatiality of Deconstruction/Destruction within an established tradition of conceiving of the Maghreb as a transversal ‘inter-zone’; this is clearly evidenced in the works of William S. Burroughs and Paul Bowles. ‘The Maghreb, far from being constructed as an ontological site, similar to the idea of the nation, is, on the contrary, thought out as the location of... an epistemic irreducible difference.’ Mignolo, *Local Histories/Global Designs*, 69; see also *ibid.* 64–84. For a discussion of the role played by the Maghrebian ‘inter-zone’ in the formation of anti-systemic movements during the event of the Grotian Moment, see below, Chapter Seven.

167 Young, *Postcolonialism*, 412.

168 *Ibid.* 414. Without explicitly saying so, Young strongly hints that one over-looked reason for Deconstruction’s comparative lack of success in penetrating British academia is related to the pronounced differences between the English and French models of Colonialism: England practiced a form of de-centralised settlement while France undertook a form of centralised assimilation. *Ibid.* 29–41.

context of the extreme rationalisation and centralisation of the French administrative system.¹⁶⁹ As Young concludes, Post-Structuralism

was in fact produced by repression, for it developed in large part out of the experience of colonialism. The structure to which it is 'post' is the colonial apparatus, the imperial machine. Its deconstruction [= 'destruction'] of the idea of totality was born out of the experience of, and forms of resistance to, the totalising regime, of the late colonial state, particularly French Algeria.¹⁷⁰

If Fascism is the sign of Europe's domestic importation of the annihilating violence of the Settler/Self, then Post-Structuralism is the sign of the 'double movement' of Europe's domestic importation of the destructive violence of the Native/Other, albeit 'sanitised'—and, therefore, legitimised—by means of discursive formation.¹⁷¹ Colonialism is the arche-trace of Deconstruction; Colonialism is also the material foundation of the Capitalist World-Economy, 'the modern/colonial world system.' This, in turn, leads us to this book's only explicitly political premise: the successful resolution of the 'problem' of Capitalism depends upon the successful completion of the 'double movement' of the solution of the 'problem' of post-coloniality. Like all of the long waves of structural history, the Modern World-System is a secular trend; that is, like the Texts that Deconstruction ironically subverts, it is governed by *finitude*.

As the Post-Structuralist 'logic' of anti-systemic movements clearly demonstrates, World-Systems Analysis does not constitute a form of instrumental Marxism despite the numerous accusations of both teleological determinism and economic reductionism levelled against it.¹⁷² Wallerstein unconditionally repudiates two of the most central pillars of Marxist analysis, teleology¹⁷³ as well as 'the

169 Ibid. 417.

170 Ibid. 415.

171 Mignolo, *Local Histories/Global Designs*, ix.

Until the middle of the twentieth century the colonial difference... honoured the classical distinction between centres and peripheries. In the second half of the twentieth century the emergence of global colonialism, managed by trans-national corporations, erased the distinction that was valid for early forms of colonialism and the colonality of power. Yesterday the colonial difference was out there, away from the centre. Today it is all over, in the peripheries of the centre and in the centres of the periphery.

172 Theda Skocpol, 'Wallerstein's World-Capitalist Theory: A Theoretical and Historical Critique', *American Journal of Sociology*, 82/5, 1075–97 at 1080 and 1088. Also Giddens, *The Nation-State and Violence*, 167. However, Giddens is, on the whole, sympathetic to World-Systems Analysis. Ibid. 161.

173 See Immanuel Wallerstein, *Historical Capitalism* (London: Verso, 1983), 97–110; Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994), 4: World-Systems Analysis as 'non-teleological, non-functional, non-deterministic.'

basic goal of Marxist political practice, the seizing of state power.¹⁷⁴ In precisely these ways, World-Systems Analysis is ideally suited for Critical Legal Studies.

Significantly, the CLS analysis of international law has not advanced an instrumental Marxist explanation for state compliance... In that view international law would be understood as the product of the interests of the dominant, wealthy, capitalist states. Other participants in the international system would be understood to have accepted liberal ideology about international life because of its 'false consciousness'. To advocate either part of the instrumental Marxist critique would conflict with CLS's own premises.¹⁷⁵

The superficial appearances of structural determinism notwithstanding, the historical emergence of the World-System is, in fact, almost wholly dependent upon a series of radically contingent variables including radical differentials in military strength;¹⁷⁶ 'in its raw form, it is an expression of the will to power, the urge to control and dominate, to imprint a pattern on events.'¹⁷⁷ As with all other inter-

174 See Berch Berberoglu, *Globalization of Capital and the Nation-State: Imperialism, Class Struggle, and the State in the Age of Global Capitalism* (New York: Rowman & Littlefield Publishers, 2003), 17–20, 53–54, on the incompatibility between neo-Marxism and World-Systems Analysis: Wallerstein is 'blamed' for his 'failure to mobilize the social forces affected by [the process of Globalisation] to challenge and transform the world system.' Ibid. 54. With typical Marxist aplomb, Berberoglu completely fails to consider that this is, in fact, the central point of World-Systems Analysis. This, of course, serves as an uncomfortable reminder as to how central thoroughly Modernist notions of agency actually are to Marxist theory. In a similar vein, Teschke laments the fact that World-Systems Analysis views Capitalism as not 'a qualitative, potentially reversible transformation of social relations, but simply a gradual quantitative expansion of the market since time immemorial.' Teschke, *The Myth of 1648*, 137. One wonders whether what Teschke finds most objectionable is World-Systems Analysis' denial of the potential for a volitional 'reversible transformation of capitalistic social relations' rather than its slide into a meta-historical indeterminacy in locating the origins of these social relations.

175 Purvis, 'Critical Legal Studies in Public International Law', 100.

176 Geoffrey Parker, 'Europe and the Wider World, 1500–1750: the Military Balance', in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 161–95, *passim*. On this point, compare Parker with the 'open' neo-Marxist Harvey, who freely concedes that 'there may be much that is contingent and accidental' in the Capitalist World-Economy—'indeed, it could not be any other way given the political struggles contained within the territorial logic of power.' Harvey, *The New Imperialism*, 184. For the radical historical contingency underlying the emergence of the early Modern World-System, see Immanuel Wallerstein, 'The West, Capitalism, and the Modern World-System', *Review*, 15/4 (1992), 561–619, at 561–80.

177 See John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: Norton, 2001), 18–19, 21–22, 407–8, on 'human nature realism'. For World-Systems Analysis, 'more than *internal* causal variables are needed to account for change; variables at the system level must be sought.' Janet L. Abu-Lughod, 'Restructuring the Pre-

pretative/aesthetic/textual(ist) configurations, the World-System is fully susceptible to the subverting iterability of hierarchies of presence/meanings.

The modern world-system is not the only world-system that has ever existed. There were many others. It is, however, the first one that was organized and able to consolidate itself as a capitalist world economy. Although initially formed primarily in (part of) Europe, its inner logic propelled it to seek the expansion of its outer boundaries.¹⁷⁸

Concomitantly, the nineteenth-century bourgeoisie learned 'for the first time that the original sin of simple robbery, which centuries ago had made possible "the original accumulation of capital" (Marx) and had started all further accumulation, had eventually to be repeated lest the motor of accumulation suddenly die down.'¹⁷⁹ Marx's own, relatively brief, comments on primitive accumulation—'the historical process of divorcing the producer from the means of production'¹⁸⁰ by 'direct non-economic force'¹⁸¹ have served as one of the templates for Wallerstein's development of World-Systems Analysis, albeit with a crucially different assessment of Colonialism. In Volume One of *Capital* we come across this remarkable passage.

The different moments of primitive accumulation can be assigned to Spain, Portugal, Holland, France and England in more or less chronological order.¹⁸² These different moments are systematically combined together at the end of the seventeenth century in England; the combination embraces the colonies, the national debt, the modern tax system and the system of protection.¹⁸³ These methods depend in part on brute force, for instance the colonial system. But they all employ the power of the state, the concentrated and organized force of society, to hasten as in a hot-house, the process of trans-

modern World-System', *Review*, XIII (1990), 273–86 at 278. Anticipating the standard neo-Marxist charge of a-historicism, it is instructive to compare Mearsheimer's comments with the historical materialist influenced insights of Hannah Arendt. 'A never-ending accumulation of property must be based on a never-ending accumulation of power... The limitless process of capital accumulation needs the political structure of so 'unlimited a Power' that it can protect growing property by constantly growing more powerful.' Arendt, *Imperialism*, 23. The problem here, as always, is World-System Analysis's preference for giving equal weight to exogenous and endogenous variables.

178 Wallerstein, 'The Inter-State Structure of the Modern-World System', 87.

179 Arendt, *Imperialism*, 28.

180 Karl Marx, *Capital: A Critique of Political Economy, Volume One*, with Introduction by Ernest Mandel, trans. Ben Fowkes (London: Penguin Books, 1990), 874–5.

181 Ibid. 899–900.

182 This serves as the basis for Wallerstein's model of 'hegemonic succession.' See below, this Chapter and Chapter Three.

183 For taxation and military force as forms of 'protection rackets', see below, Chapter Seven.

formation of the feudal mode of production into [the] capitalist mode, and to shorten the transition.¹⁸⁴

From the perspective of World-Systems Analysis, there are two issues of outstanding concern raised by Marx. Firstly, Marx *implicitly* identifies Colonialism as a semi-institutionalised form of primitive accumulation, effectively collapsing the distinction between the two; this serves to problematise even further the highly iterable relationship between the ‘public’ and the ‘private’ domains of property and agency in the 17th century, one of the basic concerns of this book. Secondly, as Mignolo has brilliantly observed, Colonialism is introduced by Marx—notably as an appendage of ‘the feudal mode of production’—only to be superseded within the grand historical meta-narrative by the emergence of Capitalism; or, in contemporary Marxist terminology, ‘capitalist modernity’.

Coloniality becomes invisible in this particular narrative, which was accepted by the majority of Marxist thinkers in Europe... trying to make colonial economies fit into the mould of European feudal economics.¹⁸⁵ In this narrow view, modernity takes centre stage and the transformation of the feudal economy into a capitalist economy, in England, at the end of the seventeenth century is portrayed as the *main* event in the history of capitalism.¹⁸⁶ *Coloniality* vanishes in and from the Eurocentric idea of ‘modernity’.¹⁸⁷

Marx’s own writing proves to be self-subverting. The teleological dismissal of original accumulation as historically ‘primitive’ is undermined precisely because of the dangerous supplement of the now ‘invisible’ coloniality which renders transverse the presumed linear chronology governing the relationship between Pre-Modern and Modern;¹⁸⁸ ‘Of course, the emergence of capitalism in Marx’s

184 Ibid. 915–16.

185 For an outstanding discussion of this apparently interminable syndrome, see Wallerstein, *The Modern World System I*, 90–100, on the issue of the ‘post-feudal’ nature of the Iberian *encomienda* system in the West Indies.

186 For a very recent, and highly pronounced, example of this see Teschke, *The Myth of 1648*, 249–270. where England alone is identified as History’s first true ‘modern’ or ‘capitalist sovereign’, and, therefore, the sole harbinger of ‘modern’ international relations. Teschke compounds Marx’s teleological conceit even further by historically locating England’s ‘capitalist sovereignty’ at the commencement of the 19th century rather than at the closure of the 17th.

187 Mignolo, *The Darker Side of the Renaissance*, 450.

188 Massimo De Angelis, ‘Marx and Primitive Accumulation: The Continuous Character of Capital’s “Enclosures”’, *The Commoner*, September 2001, <http://www.commoner.org.uk/o2deangelis.pdf>, 1–22 at 10 fn. 6:

According to the ‘stage theory’ interpretation, Marx divides world history into stages, each of which has its own economic and social structure. The transition from an ‘inferior’ to a ‘superior’ stage must follow a logical path, and it is not possible to skip stages of development. This interpretation, which was dominant until not long ago, constitutes the basic framework of classic historic materialism. It is linked to the historical

narrative was not the end of colonialism—on the contrary. Capitalism cannot survive without colonialism in the same way that modernity cannot be what it is without coloniality.¹⁸⁹

The lurking presence of 'original' or 'primitive' accumulation as a dangerous supplement within the Capitalist World-Economy—or 'capitalist modernity'—effectively undermines the latent teleology of orthodox Marxist discourse; the iterable transversal between the 'primitive' and the 'modern' effectively de-privileges Capitalism as Modernity. A number of open Marxists have made point clearly.

The idea that capitalism must perpetually have something 'outside of itself' in order to stabilize itself is worthy of scrutiny... Put in the language of contemporary postmodern political theory, we might say that capitalism necessarily and always creates its own 'other'. The idea that some sort of 'outside' is necessary for the stabilization of capitalism therefore has relevance.¹⁹⁰

This accords well with World-Systems Analysis, which adopts an anti-essentialist definition of Capitalism: 'Capitalism utilises many forms of value, including both free and unfree ones. There is no necessary incompatibility of capital or capitalism even with the most severe forms of slavery. The history of "primitive accumulation" in early modern capitalism illustrates this point clearly.'¹⁹¹ Accordingly

A general re-evaluation of the continuous role and persistence of the predatory practices of 'primitive' or 'original' accumulation within the long historical geography of capital accumulation is, therefore, very much in order... *Since it seems peculiar to call an ongoing process 'primitive' or 'original'* I shall... substitute these terms by the concept of 'accumulation by dispossession'.¹⁹²

We may regard Harvey's 'accumulation by dispossession' as the dangerous supplement to so-called 'capitalist modernity'; the ubiquitous Other whose lurk-

interpretation of primitive accumulation, in that a temporally clear cut primitive accumulation would create the conditions for the transition to the capitalist [the 'mature'] stage of world history.

Wallerstein's own comments on Marx and neo-Marxism seem most appropriate here. 'Orthodox Marxism is mired in the imaginary of nineteenth-century social science, which it shares with classical liberalism: capitalism is inevitable progress over feudalism; the factory system is the quintessential capitalist production process; social processes are linear; the economic base controls the less fundamental political and cultural superstructure.' Wallerstein, *World-Systems Analysis*, 20.

189 Mignolo, *The Darker Side of the Renaissance*, 451.

190 Harvey, *The New Imperialism*, 140–1.

191 Gills, 'World System Analysis', 147.

192 Harvey, *The New Imperialism*, 144. For an extended discussion of 'accumulation by dispossession' as a central pillar of contemporary capitalistic practice, see *ibid.* 137–82.

ing presence signifies the final iterability between capitalist and pre-capitalistic forms. This irreducible *uncertainty* concerning the objective demarcation(s) between Capitalism/Modernity and Pre-Capitalism/Pre-Modernity is one of the hallmark features of World-Systems Analysis.¹⁹³

This insight, in turn, forces us to re-problematise the alleged ‘modernity’ of contemporary international political structures and forms. Historically, world economies have been ‘unstable structures leading either towards disintegration or conquest by one group and hence transformation into a world-empire.’¹⁹⁴ However, a world capitalist economy ‘does not permit true imperium.’¹⁹⁵ ‘Capital has never allowed its aspirations to be determined by national boundaries in a capitalist world-economy, and that the creation of “national barriers”—generally mercantilism—has historically been a defensive mechanism of capitalists located in states which are one level below the high point of strength in the system.’¹⁹⁶

- 193 Barry K. Gills and Andre Gunder Frank, ‘World System Cycles, Crises, and Hegemonial Shifts, 1700 BC to 1700 AD’, *Review*, 15/4 (1992), 621–87, *passim*. In a manner parallel to Wallerstein, Frank and Gills argue that

it is not the mode of production which determines the overall developmental patterns and outcomes of [the world system]—but the nature of [the world system] itself, of which the various modes are (only) an element. The search for any supposed ‘transitions’ between such ‘modes’ only obscures the essential continuity of participation in the same one and only world system... Similarly, the whole period of world history since 1500 has been less ‘defined’ by ‘capitalism’ than it was generally defined and characterized by shifts in the routes of trade, centres of accumulation, and the location of hegemonic power from ‘East’ to ‘West’.

Andre Gunder Frank and Barry K. Gills, ‘Rejoinder and Conclusions’, in eid. (eds) *The World System: Five Hundred Years or Five Thousand?* (New York: Routledge, 1993), 297–307 at 303.

- 194 Egypt, China, India, Rome, Byzantium. Wallerstein, *The Capitalist World-Economy*, 5. For further discussion of the unified statism of world-empire, see below, Chapter Three.
- 195 Ibid.
- 196 Ibid. 19.

From the point of view of entrepreneurs operating in the capitalist world-economy, the sovereign states assert authority in at least seven principal areas of direct interest to them: (1) States set the rules on whether and under what conditions commodities, capital, and labour may cross their borders. (2) They create the rules concerning property rights within their states. (3) They set rules concerning employment and the compensation of employees. (4) They decide which costs firms must internalise. (5) They decide what kinds of economic processes may be monopolized, and to what degree. (6) They tax. (7) Finally when firms are based within their boundaries may be affected, they can use their power externally to affect the decisions of other states... Capitalists need a large market... but they also need a multiplicity of states, so that they can gain the advantages of working with states but can also circumvent states hostile to their interests in favour of states friendly to their interests. Only the existence of a multiplicity of states within the overall division of labour assures this possibility.

Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Durham: Duke University Press, 2004), 46 and 24.

Alternatively, the monist, anti-free trade imperial framework 'established political constraints which prevented the effective growth of capitalism, set limits on economic growth and sowed the seeds of stagnation and/or disintegration.'¹⁹⁷ Although thoroughly integrated, the World-System, precisely because it is premised upon the absence of totalising political structures, is radically *de-centralised*.¹⁹⁸ This leads, in turn, to one of the most striking similarities between World-Systems Analysis and Deconstruction: a radical anti-essentialism. For Wallerstein, the World-System 'lacks a central actor in its recounting of history.' In contrast to other interpretative models that prioritise a particular set of actors, such as the working class for Marxism or the Nation-States for Realism, World-Systems Analysis postulates that these actors

just like the long list of structures that one can enumerate, are the products of a process. They are not primordial atomic elements, but part of a systemic mix out of which they emerged and upon which they act. They act freely, but their freedom is constrained by their biographies and the social prisons of which they are a part.¹⁹⁹

As with Deconstruction, World-Systems Analysis repudiates the logic of a unifying 'Self' or 'Subject,' premised instead upon a polycentric model of interstate relationships.²⁰⁰

In these ways, the internal inconsistencies of International Law are reflective, via mimetic repetition, of the internal contradictions and inconsistencies of the Modern World-System itself. The World-System does not deterministically govern the formal or the substantive content of juridical Texts such as *De Indis* but establishes the 'material historicist' parameters for the possibilities of emergence and discursive production of such a Text; that is, the Grotian Heritage. Here, we would categorise the historicised 'trace' of the proto-statist World-Economy as a

197 Wallerstein, *The Capitalist World-Economy*, 37.

198 Eric R. Wolf, *Europe and the Peoples without History* (Berkeley: University of California Press, 1997), 3–23.

199 Wallerstein, *World-Systems Analysis*, 21.

200 Terence H. Hopkins and Immanuel Wallerstein, 'Capitalism and the Incorporation of New Zones into the World-Economy,' *Review*, X/5–6 Supp. (1987), 763–79 at 764:

A world-economy is defined as that kind of world-system in which the political and cultural 'structures' are multiple and the system-wide political and cultural structures are far less tangible and immediately constraining than more 'local' ones...a capitalist mode of production can only thrive (indeed only survive) within a system in which the abilities of political structures to counteract the law of value in the long run are limited, but one within which there are strong enough political structures such that the law of value can indeed be constrained in the short run. A system of multiple states of unequal power linked in an interstate system coordinate with the boundaries of the real social economy (that is to say, a world-economy) meets in fact these conditions. The interstate system is not a simple assemblage of states but a structured order with rules and mechanisms. It is doubtful that in the absence of such an interstate system the capitalist mode of production could survive.

discursive formation,²⁰¹ 'a system of interdependent arguments in which the value of each argument results solely from the simultaneous presence of the others.'²⁰² The 'meaning' of the particular 'unit of analysis' (i.e. tribe, country, State) is determined by its precise location within a whole that is radically pluralistic; in certain critical regards, World-Systems Analysis constitutes an empirico-inductive replication of the Structural logic of *langue/parole*, the 'unit of analysis' inseparable from the encompassing 'social system.'²⁰³ The axial division of labour within the Capitalist World-Economy guarantees a relational rather than an essentialist inter-state system; 'core-periphery is a *relational* concept, not a pair of terms that are reified, that is, have separate essential meanings.'²⁰⁴ There is a vital convergence here between theory and practice, discursive and material structures dialectically bound through a strict logic of iterability. The institutional apparatuses of global exploitation give rise to and are, in turn, ideologically legitimated by discursive systems of meaning. The World-Economy as arche-trace itself co-inhabits the ideology/material divide.

This point requires further elucidation. Although frequently used interchangeably in the literature of Deconstruction, 'trace' and 'arche-trace' possess quite different and technically precise meanings. 'Generally speaking, one could say that deconstruction starts with the Texts to be deconstructed by focusing on traits within conceptual structures, or on concepts within conceptual dyads that, for reasons to be historically determined, have been confined to a secondary role,

201 Michel Foucault, *The Archaeology of Knowledge and The Discourse on Language* (New York: Pantheon Books, 1972), 31–39.

202 David Kennedy, 'Theses about International Law Discourse', *German Yearbook of International Law*, 23 (1980), 353–91 at 375.

203 Robert A. Denemark, 'World System History: From Traditional International Politics to the Study of Global Relations', *International Studies Review*, 1 (1999), 43–75 at 51:

World system history begins with the suggestion that the whole system, the *interaction* of what we see as its units, and not the constitution and/or functioning of the units themselves, is the proper focus of attention. It is 'systemic' in this sense: taking the contentious methodological proposition that the whole is greater than the sum of its parts, and that the 'system' provides the architecture and the incentives that structure the action of the various component units.

204 Wallerstein, *World-Systems Analysis*, 17. 'Thus, for shorthand purposes we can talk of core states and peripheral states, so long as we remember that we are really talking of a relationship between production processes... The role of each state is different vis-à-vis productive processes, depending on the mix of core-peripheral processes within it.' Ibid. 28, 29. With remarkably Post-Structuralist language, Lane holds that Wallerstein's units of analysis 'are complex composites. To test their degree of relevance or to verify truths concerning them, they must be broken down into the elements of which they are composed. The result may be to demonstrate that the composite ideal type contains disparate or even contradictory elements.' Frederic C. Lane, *Profits From Power: Readings in Protection Rent and Violence-Controlling Enterprises* (Albany: State University of New York Press, 1979), 103.

or put, so to speak, on reserve.²⁰⁵ Deconstruction is a radically *historical* enterprise; when making its critical incisions, it pays the utmost attention to those dyadic elements that have been subordinated, or even repressed, as bearing the traces of specifiable historical processes. The introduction of temporality into deconstructive practice enables one to draw the distinction between the two forms of the 'traces.' The 'trace' signifies the transcendental, the sign of an operational presence of an appositional or supplementary term that is textually absent. The 'arche-trace'—alternatively referred to as the 'instituted trace'—is understood in a more explicitly temporal sense, as signifying the historical conditions governing the contours of the trace.²⁰⁶ These historical conditions, in turn, are defined as the 'institution.'

The notion of an institution... refers in general to a cultural and historical instauration. The trace, in its colloquial sense, is instituted in this way, but not the *instituted trace*. What then is the arche-trace or the *instituted trace* if it is neither a trace in the colloquial sense nor simply instituted? The arche-trace on the contrary, is the movement which produces the difference of presence and absence constitutive of the colloquial sense of the trace as well as the difference of nature and culture constitutive of the idea of institution.²⁰⁷

As is always the case with Deconstruction, *differance* is the key. For Derrida, the 'general structure of the unmotivated [i.e. instituted] trace connects within the same possibility and they [trace and arche-trace] cannot be separated except by abstraction, the structure of the relationship with the other, the moment of temporalization, and language as unity.'²⁰⁸ If we are to make our deconstructive incisions into Grotius' *De Indis*, we must do so while fully mindful of the inseparability of trace/arche-trace, co-joined through both temporalisation and language-as-writing. We recognise that *De Indis* consists of three identifiable discursive strata that, taken together, constitute whatever degree of internal coherence that the work possesses. 'On the Law of Prize and Booty', as Text, bears the mark, or trace, of Republicanism, which is itself constituted, in turn, by the historical instauration of the Modern World-System: the arche-trace. Again, *differance* operates; the Modern World-System is the perpetual deferment, via *differance*, of World-Empire. Any act of incision must necessarily transverse *all* three discursive levels if the internal coherence of the work is to be uncovered: not 'On the Law of the Prize and Booty', but 'Concerning the Indies/Indians.' We are faced, then, with two incommensurable strata of dyadic structures: *De Indis*/Republicanism and *De Indis*/Modern World-System.

205 Gasche, *The Tain of the Mirror*, 171.

206 Ibid. 165.

207 Gasche, *Inventions of Difference*, 45.

208 Derrida, *Of Grammatology*, 47.

As Gasche correctly remarks, the arche-trace ‘explains why a concept of a plenitude or presence can be thought only within dyadic conceptual structures.’²⁰⁹ I argue that there are indeed multiple strata present within the Grotian Text, one intra-textual, the other transversal. The differentiated intra-textual, the one that inhabits the site of *De Indis* itself, are the conceptual structures of ‘Utopia/Normativity’ and ‘Apology/Concreteness.’²¹⁰ The differentiated transversal layer is the extra-textual trace of Republicanism/Absolutism and the instituted arche-trace of Modern World-System/World-Empire. The Modern World-System is the historical instauration of *De Indis*. It grounds the dyadic structures of the Text serving as the template for international legal discourse. It is historical in that its operations serve as the medium for the implementation of historically specific techniques of economic extraction and re-distribution—the globally axial division of labour. The various embedded/structural contradictions of Holland’s position as hegemon within the earliest phases of the Modern World-System themselves serve as ‘the contested arena’ for both the latent and manifest textual indeterminacies and fissures of *De Indis* itself; these constitute both the Text and the trace.

The ‘materiality’ of the arche-trace, the Capitalist World-Economy itself, might appear to warrant a theoretical shift towards neo-Marxism. Considerations of historical materiality, however, are in fact perfectly consistent with Post-Structuralism; ‘since it deals with texts, deconstruction finds its starting-point in material situations—texts and institutions—but its vantage point is the gap between materiality [structure] and phenomenality [practice].’²¹¹ This ‘gap’ is itself the element of indeterminacy; the Grotian Text is historically grounded within the arche-trace, but it is neither exhaustively defined nor determined by it. The relationship between Text and arche-trace is mimetic, effecting a ‘replication’ or ‘imitation’ between discursive formation and historical/material structure; ‘concepts and discursive totalities are already cracked and fissured by necessary contradictions and heterogeneities.’²¹² For Derrida

If words and concepts receive meaning only in sequences of differences, one can justify one’s language, and one’s choice of terms, only within a topic [an orientation in space] and an historical strategy. The justification can therefore never be absolute and definitive. It corresponds to a condition of forces and translates an historical calculation.²¹³

²⁰⁹ Gasche, *The Tain of the Mirror*, 187.

²¹⁰ In the discourse of seventeenth-century jurisprudence, these conceptual structures correspond to the two competing variants of Natural Law, Late Scholasticism and Civic Humanism. This will be discussed in greater detail below, this Chapter.

²¹¹ Kevin Hart, *The Trespass of the Sign: Deconstruction, Theology and Philosophy* (New York: Fordham University Press, 2000), 173. See Rorty, *Essays on Heidegger and Others*, 111–18.

²¹² Gasche, *The Tain of the Mirror: Derrida and the Philosophy of Reflection*, 136.

²¹³ Derrida, *Of Grammatology*, 70.

It is not the case that early international lawyers such as Grotius were providing formal doctrinal expression of a 'self-aware' international community.²¹⁴ Here, the arche-trace signifies the totality of the hierarchical political and economic system(s) that historically bounded both the United Provinces and the VOC, as discursively signified by the antinomy of 'Concreteness'/Colonialism and 'Normativity'/International Law. *De Indis* serves as a template for the competing—and contradictory—juridical and political discourse(s) of the World-System. Identifying the World-System as arche-trace, therefore, precludes the need to locate an 'authorial presence' or 'intent' within the Text, which would deterministically infer that Grotius was consciously aware of what we call 'the Modern World-System'.²¹⁵ Indeed, if we wanted to push this line of reasoning even further and ground our deconstructive incisions upon the very strongest considerations of historical instauration, we would assert that the Text/*De Indis* corresponds to the history of the event, the trace/Republicanism corresponds to the history of the conjuncture, and the arche-trace/Modern World-System corresponds to the history of structure.²¹⁶ Indeed, if we are to fully appreciate the historical instauration of *De Indis* as the hermeneutical key to the Text we must undertake a 'double movement' from the structure to the event and then back again.

214 Richard Tuck, *The Rights of War and Peace: Political Thought and International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999), 11–12.

The generation of scholars who first looked at [the history of the 'Just War Tradition'] in a systematic manner—the scholars funded by the Carnegie Endowment from the time of the First World War onwards, working under the influence of James Scott Brown—left us with a very misleading picture of the pre-Grotian ideas about the laws of war and peace. Like many older historians of a particular 'discipline', they assumed that the subject of 'international law' was gradually uncovered and understood in increasingly less primitive terms by writers from the Middle Ages onwards, in a manner analogous to pre-Kuhnian ideas about the history of physics; so that (to cite some pre-Grotian writers whom they translated and reprinted) Vitoria, Ayala, Belli, and Gentili were all trying to 'clarify' some inchoate principles of international law.

215 For linkages between the Arche-trace and the 'exteriority' of the historically material, See Michael Ryan, *Marxism and Deconstruction: A Critical Appraisal* (Baltimore: Johns Hopkins University Press, 1982), 14–5, 26, 50 and 79.

The point of origin is split by what makes it original, the necessity of reproduction. This is a trace structure. That structure or force of differentiation or original repetition operates without 'being' anything present which one could know through empirical observation. It acts, producing effects, while remaining outside the field of presence, or of a localizable 'instance', just as the relational structure or force of exchange value exists nowhere concretely except as the effects it produces.

Ibid. 101

216 Notice that while both trace and arche-trace are differentiated—Republicanism/Absolutism; Modern World-System/World-Empire—the Text does not appear to possess an 'Other'. I argue that it does indeed have an 'Other'; this will be discussed in further detail in Chapter Eight.

III *Histoire Structurale*/Grewé's Epochs: Hegemony and the Early Modern World-System

Operating as a juridical author within the arche-trace of the Modern World-System, Grotius is best understood as performing the function of 'Symbolic' or 'Mythical' Self-Validation.²¹⁷

Once the search for historical legitimacy has been abandoned, what is required is an understanding of how the process of cultural organization in internal life operates to create the world and allow for changes... The mythical fabric of international culture permits [all] sovereigns to assert international law without defending its national authority. Self-validation occurs through the manipulation of cultural language, symbols and history. In this cultural soup, myth can acquire a flavour of legitimacy capable of producing psychological obligations in sovereigns. Symbolic authority can be conferred on international rules and institutions in many ways. Rulers may be validated through ritual. Institutions may be validated through architecture, transferred authority (like famous leaders) or other cultural attention. Alternatively, rules and institutions may become authoritative because of their pedigrees, their 'historical origin' and cultural 'deep-rootedness'. International Law's weaknesses are in some sense irrelevant; self-validation sanctions the international law-myth.²¹⁸

Herein, the Liberal re-presentation of unequal hierarchies of power does indeed serve a functional or instrumental purpose, but one that fails to yield a counter-vailing critical/interpretative paradigm.

Liberal ideology makes political choice look either like unquestionable 'natural' law or logical compulsion. In this sense it mystifies and obfuscates the international order it has established. Both the anthropological and ideological theories make sense of international law's authority by showing the manner in which sovereigns self-validate international law. Liberal ideology provides sovereigns with a self-validating escape from the need to reason to their acceptance of international law's authority. Sovereigns embrace the purported naturalness and coherence of an ethical theory that is sovereign-centric. In turn, this allows them to believe in²¹⁹ the neutrality of the liberal theory of politics and the liberal theory of adjudication. Sovereigns thus come to accept the authority of

²¹⁷ A Post-Structuralist riposte to the standard Marxist canard of 'false consciousness'; Having put forward [a] simplified and secularised account of Hegel, Marx encountered a curious circumstance: why did labourers not take political action to achieve subjective freedom? In fact, why did they not even seem conscious of the existence of this choice?... The multiplication of Marxisms during the twentieth century can be attributed to the failure of the contradictions within the capitalist economic structure to produce the dissolution of capitalism.

Heller, 'Structuralism and Critique', 166 and 168.

²¹⁸ Purvis, 'Critical Legal Studies in Public International Law', 112.

²¹⁹ Or, merely cynically 'assert'?

international law and the rule of law as a neutral, determinant, and coherent system, when, in fact, it is none of those things.²²⁰

The establishment of the material conditions governing the emergence of the necessary political and market pre-conditions of the statist form of territoriality and Capitalism is central to the World-System, as it is to both the Grotian Heritage and to International Law.

Only the modern world-system (the capitalist world-economy) has evolved a political structure composed of states, each of which claims to extensive 'sovereignty' in a delimited geographical area, and which are collectively bound together in an interstate system. Such a political structure is in fact the only kind of structure that can guarantee the persistence of the partially free market which is the key requirement of a system based on the ceaseless accumulation of capital. Capitalism and the modern state-system were not two separate historical inventions (or conceptions) that had to be fitted together or articulated with each other. They were obverse sides of a single coin. They were both part of a seamless whole. Neither is imaginable without the other. They were simultaneously developed, and neither could continue to exist without the other.²²¹

The internal political logic of this interstate *societas* is, in turn, governed by the seminal notion of hegemony.

Hegemony is what occurs in a world-economy, one that has not become a world-empire. The political superstructure of a world-economy is not a bureaucratic empire but an interstate system composed of allegedly sovereign states. And a hegemonic state is not simply a strong state, nor even simply the strongest single state within the interstate system, but a state that is significantly stronger than other strong... states.²²²

The last point needs to be re-emphasised; as we have already seen 'the emergence of a world market was dependent on the pluralistic structure of the European (and, subsequently, the global) political system.'²²³

Grewe has placed the concept of hegemony at the centre of his magisterial legal history, *The Epochs of International Law*. Labouring under the aegis of Carl

220 Purvis, 'Critical Legal Studies in Public International Law', 113. See Shirley V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics', *European Journal of International Law*, 5/3 (1994), 313–25, *passim*.

221 Purvis, 'Critical Legal Studies in Public International Law', 89.

222 Giovanni Arrighi, 'The Three Hegemonies of Historical Capitalism', *Review*, 13/3 (1990), 365–408 at 375.

223 Robert Gilpin, *War & Change in World Politics* (Cambridge: Cambridge University Press, 1981), 131.

Schmitt,²²⁴ Grewe folds International Law into the juro-political act of the legitimation of hegemonial interstate relations, virtually reducing it to the epiphenomenal. Hegemony is inseparable from the broader juridical construction of 'legal order,' the 'normative image of a natural state of order,' exhibiting both utopian and apologist characteristics.

The totality of diverse legal rules deserves to be called a legal order if it deals with the totality of facts needing to be regulated legally in a manner which corresponds to the specific intellectual, cultural, social and political situation in question and which establishes directions for existing in this situation. In other words, the principal context in which individual legal rules and institutions are found is not logical, but morphological.²²⁵

Crucially, hegemony is not identical with Empire, which implicitly presupposes a monist juro-political regime. Rather, hegemony is founded upon expressly pluralistic principles, reflected through the alternating geo-political strategies of 'domination' (*Herrschaft*) and 'influence' (*Einfluss*), the later, because of its predominately non-military nature, the more cost efficient of the two.²²⁶ The complex interplay between material and ideological factors parallels, in turn, a concomitant rivalry among contending conceptions of international legal order. 'This order emerges in every age as a result of the struggle of the legal and political ideas and positions of the rival powers of that age, in which the leading power succeeds in making its ideas and positions prevail and in securing recognition of their natural effectiveness.'²²⁷ The notion of hegemony as cultural *Einfluss* renders

224 Martti Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations,' in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 17–33, *passim*.

225 Grewe, *The Epochs of International Law*, 32.

[My] starting point was the history of modern international law, and [my] endeavour not so much the systematic presentation of that history as its morphological division, its periodisation, and the development of a system of typological concepts. This task has been seriously neglected in the study of international law up to the present day [1943] in contrast to the situation in which those who study politics and constitutions find themselves...By contrast, the establishment of typological concepts in international law is still so underdeveloped that, when one speaks of 'classical international law', one can by no means be certain of being properly understood.

Ibid. 1.

226 Eric Wilson, '“Much Wailing and Gnashing of Teeth”: On the Loneliest Superpower and the Flailing of Impotent Limbs,' *Monash University Law Review*, 29/2 (2003), 410–16, *passim*.

227 Grewe, *The Epochs of International Law*, 275. 'Historically, every approach in the past to a world society has been the product of the ascendancy of a single power.' Carr, *The Twenty Year's Crisis 1919–1939: An Introduction to the Study of International Relations*, 232.

its practical enforcement inextricable from the wider process of juro-political legitimation.

Hegemony is... something more and different than domination pure and simple: it is the *additional* power that accrues to a dominant group by virtue of its capacity to lead society in a direction that not only serves the dominant group's interests, but is also perceived by subordinate groups as serving a more general interest. It is the inverse of the notion of 'power deflation' used by Talcott Parsons to designate situations in which governmental control cannot be exercised except through the widespread use or threat of force. If subordinate groups have confidence in their rulers, systems of domination can be governed without resorting to force. But if that confidence wanes, they cannot... When such credibility is lacking, we shall speak of 'dominance without hegemony'.²²⁸

The agonistic pluralism of values, in turn, reflects a correlative plurality of legal personalities.

In sum, an international legal order can only be assumed to exist if there is a plurality of relatively independent (although not necessarily equal-ranking) bodies politic which are linked to each other in political, economic and cultural relationships and which are not subject to a superimposed authority having comprehensive law-making jurisdiction and executive competence. In their mutual relations these bodies politic must observe norms which are deemed to be binding on the basis of a legal consciousness rooted in religious, cultural and other common values.²²⁹

The 'true' hegemonic actor, in either statist or non-statist form, succeeds in achieving recognition as a 'surrogate of sovereignty',²³⁰ the sole agent capable of regulating global governance through its effective performance of the indispensable 'anti-anarchical' function.

There is a necessarily Foucauldian dimension to hegemony, as it exists only through the successful exertion of material and ideological power as against

228 Giovanni Arrighi and Beverly J. Silver, 'Introduction', in id. (eds), *Chaos and Governance in the Modern World System* (Minneapolis: University of Minnesota Press, 1999), 1–36 at 26–27.

229 Grewe, *The Epochs of International Law*, 7.

The political and international legal programmes of the modern European States were all, however, expressions of ideologies of national expansion. The stronger the leading position of the particular predominant power, the more that State marked the spiritual vision of the age, the more its ideas and concepts prevailed, the more it conferred general and absolute validity on expressions of its nationalist expansionist ideology.

Ibid. 23.

230 Kenneth M. Waltz, *A Theory of International Politics* (Reading: Addison-Wesley, 1979), 16.

some oppositional force.²³¹ By this logic, it stands that no imperial system could ever be a 'true' hegemon; the abolition of all contending identities and value systems would itself be identical with the abolition of power. Hegemony, as the practical expression of international legal order, requires a relative 'dis-unification' of geo-territorial space(s), logically negating the existence of *imperium*. This, in turn, serves as the juro-political corollary of the economic logic of the Capitalist World-System, which requires a disaggregated political system: 'the imperial framework established political restraints which prevented the effective growth of capitalism, set limits on economic growth and sowed the seeds of stagnation and/or disintegration.'²³² From Grewe's perspective, the sub-text of the 'Grotian Moment'—alternatively, the 'Spanish Epoch' (1494–1648)²³³ of the 'long' sixteenth century (c.1450–1640)—consists precisely in the ultimate failure of the Iberian powers to successfully attain 'true' hegemonic status, through either the successful application of military force (*Herrschaft*) and of ideological legitimation (*Einfluss*). As Wallerstein succinctly summarises: 'From the sixteenth century on, the nation-states of western Europe sought to create relatively homogenous national societies at the core of empires²³⁴...[the establishment of the balance of power signified] the defeat of an attempt to create political empires that would match economic areas.'²³⁵ The crucial element missing from Grewe's account, however, is an adequate historical methodology; World Systems-Analysis provides the necessary supplement.

IV The Early Modern World-System as Epoch of Global Governance

This final point appears even more self-evident when one realises that the Modern World-System is itself governed by the principle of iterability, the practical realisation of the material policing of the hierarchical divisions between the Core and Periphery.

The activities of the more productive nodes [of the World-System] have tended to be geographically concentrated in a few, relatively small areas of the world-economy, which we may collectively call the core zone. The less profitable nodes tend to have their units of economic activity more geographically dispersed, most of these units being located in a much larger area we may call the peripheral zone. But while core and periphery are terms of geographical origin and geographical consequence, they are not used here primarily as spatial terms, but rather as relational terms. A core-periphery relation is the relation between the more monopolized sectors of production on the

231 'One exists only when fixed in definite relations of domination.' Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (Harmondsworth: Penguin Books, 1979), 291.

232 Wallerstein, *The Capitalist World-Economy*, 37. See below, Chapter Three.

233 Grewe, *The Epochs of International Law*, 137–275.

234 Wallerstein, *The Modern World-System I*, 20.

235 Ibid. 184.

one hand and the more competitive on the other, and therefore the relation between world capital and world labour; but it is also a relation between stronger capitalists and weaker capitalists. The major consequence of integrating the two kinds of activities is the transfer of surplus-value from the peripheral sector to the core sector, that is, not merely from the workers to the owners but from the owners (or controllers) of the of the peripheral productive activities to the owners (or controllers) of the core activities, the big capitalists.²³⁶

There are three essential components of the Modern World-System. Firstly, the hegemonial interstate system emerged symbiotically with a global(ising) Capitalist World Economy. On one level, as already discussed, this implies the inherent Iterability between statist and market forms: 'the States are... created institutions reflecting the needs of [trans-national] class forces operating in the world economy.'²³⁷ On a deeper structural level, Capitalism forms the indispensable economic context for hegemonial rivalry; non-capitalist economies, because of lower rates of efficiency, prove unable to sustain modern interstate competition.

Hegemony in the interstate system refers to that situation in which the ongoing rivalry between the so-called 'great powers' is so unbalanced that one power is truly *primus inter pares*; that is, one power can largely impose its rules and its wishes (at the very least by effective veto power) in the economic, political, military, diplomatic and even cultural arenas. The material base of such power lies in the ability of enterprises domiciled in that power to operate more effectively in all three major economic arenas—agro-industrial production, commerce, and finance. The edge in efficiency of which we are speaking is one so great that these enterprises can not only outbid enterprises domiciled in other great powers in the world market in general, but quite specifically in very many instances within the home markets of the rival powers themselves.²³⁸

Secondly, the political logic of both intra- and interstate actors is structurally embedded within the operational logic of the entirety of the World-System; the

236 Wallerstein, 'The Inter-State Structure of the Modern-World System', 88.

237 Immanuel Wallerstein, *The Politics of the World-Economy: the State, the Movement, the Civilizations* (Cambridge: Cambridge University Press, 1984), 33. 'The interstate system is, in fact, the framework within which the states are defined. It is the fact that the states of the capitalist world-economy exist within the framework of an interstate system that is the *differentia specifica* of the modern state, distinguishing it from other bureaucratic polities.' Ibid.

238 Ibid. 38–9. 'The earlier winners in the struggle for world leadership owed a significant proportion of their success to their ability to obtain credit inexpensively, to sustain relatively large debts, and generally to leverage the initially limited basis of their wealth to meet their staggering military expenses.' Karen A. Rassler and William R. Thompson, *War and State Making: The Shaping of the Global Powers* (Boston: Unwin Hyman, 1989), 89.

correct 'unit of analysis' is now understood to be the totality of the Capitalist World-Economy.²³⁹ Within World-System terms, hegemony refers only to

Situations in which the [competitive] edge is so significant that allied major powers are de facto client states and opposed major powers feel relatively frustrated and highly defensive vis-à-vis the hegemonic power... [However, there is never] any moment when a hegemonic power is omnipotent and capable of doing anything it wants. Omnipotence does not exist within the interstate system.²⁴⁰ Hegemony, therefore, is not a state of being but rather one end of a fluid continuum which describes the rivalry relations of great powers to each other.²⁴¹

The operational pairing of hegemony with Legitimation and the correlative interdependency between hegemony and Capitalism²⁴² dictates that the historically 'true' hegemon—the successor 'commercial republics' of the United Provinces, the United Kingdom, the United States—be both the most successful practitioner and advocate of Liberalism and Free Market economics during its prescribed period of hegemonic *Einfluss*.

Hegemonic powers during the period of their hegemony tended to be advocates of global 'liberalism'. They came forward as defenders of the principle of the free flow of the factors of production (goods, capital and labour) throughout the world-economy. They were hostile in general to mercantilist restrictions on trade, including the existence of overseas colonies for the stronger countries. They extended this liberalism to a generalized endorsement of liberal parliamentary institutions (and a concurrent distaste for political change by violent means), political restraints on the arbitrariness of bureaucratic power, and civil liberties (and a concurrent open door for political exiles).²⁴³

Thirdly, during the sixteenth- and seventeenth-century gestation of the Capitalist World-Economy, the Nation-States of western Europe collectively emerged as the intra-hegemonic 'core zone' of the World-System, the remnants of international society being relegated to either the 'semi-periphery' (Russia; the Ottoman Empire) or the 'periphery' (the Americas; the Indian Ocean).

Given slightly different starting points, the interests of various local groups converged in northwest Europe, leading to the development of strong state mechanisms, and diverged sharply in the peripheral areas leading to very weak ones. Once we get a difference in the strength of these state mechanisms, we get the operation of 'unequal

239 Wallerstein, *The Modern World-System I*, 3–8.

240 Otherwise, the hegemon would constitute an Empire.

241 Wallerstein, *The Capitalist World-Economy*, 39.

242 'Hegemony... refers to that short interval in which there is a *simultaneous* advantage in all three economic domains' of the agro-industrial, commercial, and financial/banking' Ibid. 41.

243 Ibid. 41.

exchange' which is enforced by the strong states on the weak ones, by core states on peripheral areas.²⁴⁴

'Unequal exchange', of course, receives formal juridical expression through the 'lines of amity' settlements of the Westphalian System. The totality of the Westphalian interstate system constitutes the material basis of Grewe's international legal order and the juro-discursive subject of International Law. Both the World-System and the World-Economy emerged in cognisable form in the mid 16th century, the exact same period as the 'Classical Era' of International Law. The common historical denominators that links all of these phenomena are western colonialism and European global hegemony.

The Nation-State, the primary signifier of both International Law and the Grotian Heritage, is, itself, an inherently expansionistic construct, simultaneously the cause and the effect of the political logic underlying the interstate system—the discursive object or 'field' of international legal praxis—that created the functional and 'rational' necessity of episodic military conflict. World-Systems Analysis labels this interstate 'eternal recurrence of the same' as the 'Long Cycle' or 'periodic hegemony'.

The inter-state structures are governed by a longer cyclical process that we may call the hegemonic cycle. Just as capital accumulation is maximized in the modern world-system when it operates via the media of a partially free market...so it is the case that capital accumulation is maximized when the inter-state structures veer neither towards the extreme of world-empire (a single overarching political structure) nor towards the extreme of the relative anarchy that derives from a situation in which there are 'multiple great powers' all of somewhat equal overall strength (military/political/economic/social). The ideal situation in terms of capital accumulation for the system as a whole is the existence of a hegemonic power, strong enough to define the rules of the game and to see that they are followed almost all of the time [i.e. structural and relational power]. When rivalry is replaced by hegemony as [the] systemic condition, it does not mean that the hegemonic power can do anything; but it does mean that it can prevent others from doing things that will significantly alter the rules. The search for hegemony in the interstate system is analogous to the search for monopoly in the world production system. It is a search for advantage never quite totally achieved.²⁴⁵

Accordingly

Hegemony involves more than core status. It may be defined as a situation wherein the products of a given core state are produced so efficiently that they are by and large

²⁴⁴ Ibid. 18.

²⁴⁵ Wallerstein, 'The Inter-State Structure of the Modern-World System', 89. See below, Chapter Three.

competitive even in the other core states, and therefore the given core state will be the primary beneficiary of a maximally free world-market.²⁴⁶

The 'liberal' hegemon, in its historically necessary dual role as both as 'surrogate government' and enforcer of Free Trade, or *liberum commercium*, necessarily produces greater long-term benefits to rival core zone states; the Grotian Heritage serves as the discursive formation of the trajectory of Dutch Hegemony, situated within the arche-trace of the Modern World-System.

The story of the... sixteenth century is the story of how Amsterdam picked up the threads of the dissolving Hapsburg Empire, creating a framework of smooth operation for the world-economy that would enable England and France to begin to emerge as strong states, eventually to have strong 'national economies.'²⁴⁷

The contending hegemonies of France and Britain in the 18th and 19th centuries, with the concomitant universalisation of the Nation-State form, signified the completion of the transition of the early modern Capitalist World-Economy to the Modern World-System.

V Heterogeneity, Neo-Medievalism and the Early Modern World-System

As we have already established, World-Systems Analysis, in a manner highly similar to Post-Structuralism,²⁴⁸ engenders a comparative deconstruction of historical agency through a rigorously anti-essentialist approach towards the primary actor of International Law, the Nation-State. 'Modern states are not the primordial framework within which historical development has occurred. They may be more usefully constituted as one set of social institutions within the capitalist world-economy, this latter being the framework within which, and of which, we can analyse... structure, *conjunctures*, and events.'²⁴⁹ For Giddens, World-Systems Analysis, through its re-assigning of relative historical weight from endogenous

246 Wallerstein, *The Modern World-System II*, 38.

247 Wallerstein, *The Modern World-System I*, 199.

248 Although they are by no means identical, primarily through the latter's reliance upon *global* history, micro- and macro-levels of analysis may prove to be highly iterable; 'all local, national, or regional histories must, in important ways... be global histories.' C.A. Bayly, *The Birth of the Modern World 1780–1914: Global Connections and Comparisons* (Oxford: Blackwell Publishing, 2004), 2. For the similitudes between World-Systems Analysis and Post-Structuralism, See Bruce Andrews, 'The Political Economy of World Capitalism: Theory and Practice', *International Organization*, 36/1 (1982), 135–63, *passim*.

249 Immanuel Wallerstein, *Unthinking Social Science: The Limits of the Nineteenth-Century Paradigm* (Cambridge: Polity Press, 1991), 57. Compare Wallerstein with Kennedy: 'For international capital, the State is always already deconstructed. The result is a sort of public order deficit which can only be made up by establishing an international institutional or legal order, by concentrating political power for inter-

to exogenous factors, constitutes 'an interpretation that strongly emphasises the regionalization of political and economic systems and which, thereby, lays stress upon spatial features of social organization and change.'²⁵⁰ Herein, the Derridean logic of heterogeneity operates on both the intra- and interstate levels.²⁵¹ 'National states are not societies that have separate, parallel histories, but [are] parts of a whole reflecting that whole.'²⁵² To understand the internal class contradictions and political struggles of a particular state, we must first situate it in the world-economy.'²⁵³ In language worthy of Derrida, Mann has proclaimed that

*Societies are constituted of multiple overlapping and intersecting sociopolitical networks of power... Societies are not unitary... They are not social systems (closed or open); they are not totalities. We can never find a single bounded society in geographical or social space. Because there is no system, no totality, there cannot be 'sub-systems', 'dimensions', or 'levels' of such a totality. Because there is no whole, social conditions cannot be reduced 'ultimately', 'in the last instance', to some systemic property of it—like the 'mode of material production', or the 'cultural' or 'normative system', or the 'forms of military organization.'*²⁵⁴

As with International Law, International Relations scholarship has undergone a 'deconstructive turn' of its own, critical theorists within the discipline shifting their focus towards the 'constitutive nature of language' and repudiating any 'closed' system of knowledge, 'in which analysis and identity are reducible to

vention in civil society.' David Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', *Transnational Law & Contemporary Problems*, 4 (1994), 329–75 at 337.

250 Giddens, *The Nation-State and Violence*, 166.

A key part of Wallerstein's approach depends upon the idea that phenomena of basic importance to capitalism—including its class-system—cannot be interpreted in 'instrumentalist' terms but have to be understood in the context of the world economy as a whole. When capitalism is seen to refer to the world capitalist economy, we see that it does not involve a single axis of class domination, but two. One is of wage-labour and capital. But this dimension has from the early origins of capitalism been interwoven with spatial hierarchy in the 'international' division of labour, setting off core from periphery.

Ibid. 165. This latter statement must be modified; the relationship between core and periphery is never static and may involve episodic transitions between them. The more accurate understanding is relational.

251 Gasche, *The Tain of the Mirror*, 89–94, 133–6. 'Bedrock... lies in both macro and micro dynamics. It consists not of one or another but of the interaction between them.' James N. Rosenau, 'Before Cooperation: Hegemons, Regimes, and Habit-Driven Actors in World Politics', *International Organization*, 40/4 (1986), 849–94 at 858.

252 Which is itself potentially infinitely divisible.

253 Wallerstein, *The Capitalist World-Economy*, 53.

254 Michael Mann, *A History of Power from the Beginning to A.D. 1760* (vol. i of *The Sources of Social Power*) (Cambridge: Cambridge University Press, 1986), 1.

binary opposition.²⁵⁵ The primary *bete-noire* of critical International Relations theory is Structural Realism, which is attacked both for its a-historical nature and its inherent essentialism.

For the neo-realist, the state is *ontologically prior* to the international system. The system's structure is produced by defining states as individual unities and *then* by noting properties that emerge when several such unities are brought into mutual reference. For the neo-realist, it is impossible to describe national structures without first fashioning a concept of the state-as-actor.²⁵⁶

Accordingly, Realism acts as a 'reduction of complex historical structures to little more than a point of transition between internal and external activities.'²⁵⁷ Critical Theory, by contrast, reformulates the Realist project in terms of Post-Structuralist categories; 'Realism is a name for a discourse of power and rule in modern global life.'²⁵⁸ The Derridean logic of heterogeneity 'pluralises' political community as a unit of analysis, subverting Realism's binary opposition(s) between 'domestic' and

255 James Der Derian, 'Philosophical Traditions in International Relations,' *Millennium*, 17 (1988), 189–93 at 192. For Agnew, critical theorists are united in 'showing how the domestic and the foreign come together under different historical circumstances rather than separating them into permanent opposition.' John Agnew, cited in A. Claire Cutler, 'Locating Authority in the Global Political Economy,' *International Studies Quarterly*, 43 (1999), 59–81 at 74. See Jim George and David Campbell, 'Patterns of Dissent and the Celebration of Difference: Critical Social Theory and International Relations,' *International Studies Quarterly*, 34 (1990), 269–93, *passim*; Richard K. Ashley, 'The Geopolitics of International Space: Toward a Critical Theory of International Politics,' *Alternatives*, 12 (1987), 403–34, *passim*; Richard K. Ashley, 'Living on the Border Lines: Man, Poststructuralism and War,' in James Der Derian and Michael J. Schapiro (eds), *International/Intertextual Relations: Postmodern Readings of World Politics* (Toronto: Lexington Books, 1989), 259–321, *passim*; Richard K. Ashley and R.B.J. Walker, 'Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies,' *International Studies Quarterly*, 34 (1990), 367–416, *passim*.

256 Richard K. Ashley, 'The Poverty of Neorealism,' in Robert O. Keohane (ed.), *Neorealism and its Critics* (New York: Columbia University Press, 1986), 255–300 at 271. Realists exhibit 'a widely-shared readiness to interpret community a-historically and monistically as a fixed thematic unity, a kind of essence, an identity transcending and uniting manifest differences in the world of human practice.' R. B. J. Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1999), 125.

257 Ibid.

258 Ashley, 'The Geopolitics of International Space: Toward a Critical Theory of International Politics,' 422. The Realist ontology of statism is interpreted as reflecting a 'concern for the defence of American power as a bulwark of the maintenance of order.' Robert W. Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory,' in Robert O. Keohane (ed.), *Neorealism and its Critics* (New York: Columbia University Press, 1986), 204–54 at 211.

'international' space(s).²⁵⁹ Whereas Realism deploys a fictitious 'community' as a primary category signifying a unified and homogenous internal 'space',²⁶⁰ Critical Theory wields the logic of the dangerous supplement to considerable effect. Domestic space is revealed as inseparably linked with 'anarchy' and international space with 'community'; 'what makes a state a state and thus identical with itself is its difference from what is different from identity: difference.'²⁶¹ Echoing Mann, Ashley declares:

Nothing is finally stable. There are no constants, no fixed meanings, no secure grounds, no profound secrets, no final structures or limits of history. Seen from afar, there is only interpretation, and interpretation itself is comprehended as a practice of domination occurring on the surface of history. History itself is grasped as a series of interpretations imposed upon interpretations—none primary, all arbitrary.²⁶²

In the absence of Realist essentialism, Critical Theory provides a radical nominalism, framing the international behaviour of states as an 'historical structure' driven by the constant re-configuration of heterogeneous statist, sub-statist, and non-statist 'social forces'.²⁶³

What might be termed 'historicist deconstruction' is of primary significance for all of the canons of Realist metaphysics, most importantly Sovereignty,²⁶⁴ which is now ruthlessly 'de-coupled' from its Realist dyad, territoriality.²⁶⁵ Weber holds that the State 'is a sign without a referent',²⁶⁶ Sovereignty, the traditional referent of the State, now abides 'by a logic of simulation in which there are no ultimate

259 Ashley, 'The Geopolitics of International Space: Toward a Critical Theory of International Politics', 413–22.

260 Realism 'invokes a Western rationalist understanding of a domestic *community-as-presence* in order to differentiate a field of internal political practice recognized as a primordial *absence-of-community*.' Ibid. 419. This model conspicuously reduplicates Modernity's conceit of the Self. See above.

261 Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), 29.

262 Ashley, 'The Geopolitics of International Space: Toward a Critical Theory of International Politics', 408–9.

263 Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', 216–25.

264 'The very attempt to treat sovereignty as a matter of definition and legal principles encourages a certain amnesia about its historical and culturally specific character.' Walker, *Inside/Outside: International Relations as Political Theory*, 166.

265 'Few things are permanent in history, and it would be rash to assume that the territorial unit of power is one of them.' Carr, *The Twenty Year's Crisis 1919–1939: An Introduction to the Study of International Relations*, 229.

266 Cynthia Weber, *Simulating Sovereignty: Intervention, the State, and Symbolic Exchange* (Cambridge: Cambridge University Press, 1999), 123.

foundations but instead a chain of interchangeable signifiers.²⁶⁷ Expressly recognising the iterable nature of Sovereignty,²⁶⁸ Post-Structuralist critique paves the way for an endless inversion of the varied hierarchies 'governing' the traditional binary taxonomies demarcating sovereign from non-sovereign forms.

States can be defined in terms of their claims to sovereignty, while sovereignty can be defined in terms of the intentions and practices of States... Identities or agents like the State... are never the product of any one institution or discourse; their meanings arise out of interaction with other States and with the international society they form.²⁶⁹

Not surprisingly, Critical Theory favours a radical approach to state recognition doctrine: 'Metaphysics aside, it is clear that recognition is a self-referential act in which states decide what states are.'²⁷⁰

267 Ibid. xi–xii.

268 Sovereignty 'denotes internal hierarchy as well as external equality.' Friedrich Kratochwil, 'Of Systems, Boundaries and Territoriality: An Inquiry into the Foundation of the State System', *World Politics*, 39/1 (1986), 27–52 at 35.

269 Thomas J. Biersteker and Cynthia Weber, 'The Social Construction of State Sovereignty', in eid. (eds), *State Sovereignty as Social Construction* (Cambridge: Cambridge University Press, 1996), 1–21 at 11 and 13. See Alexander B. Murphy, 'The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations', in Biersteker and Weber (eds), *State Sovereignty as Social Construction*, 81–120, *passim*; Stephen D. Krasner, 'Rethinking the Sovereign State Model', in Cox, Dunne and Booth (eds), *Empires, Systems and States: Great Transformations in International Politics*, 17–42, *passim*; Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization*, 55/2 (2001), 251–87, *passim*; Robert H. Jackson, 'Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World', *International Organization*, 41/4 (1987), 519–49, *passim*; Bartelson, *A Genealogy of Sovereignty*, 12–34.

270 David Strang, 'Contested Sovereignty: the Social Construction of Colonial Imperialism', in Biersteker and Weber (eds), *State Sovereignty as Social Construction*, 22–49 at 22. 'Instead of asking "what is represented?" or "what are represented as the foundations of state sovereignty?" we now ask "how does the representation assumption affect our understanding of state sovereignty and intervention?"' Weber, *Simulating Sovereignty: Intervention, the State, and Symbolic Exchange*, xii. See below, Chapters Three and Eight. Not surprisingly, World-Systems Analysis adopts a similar radically nominalist outlook. Sovereignty

is a claim, and claims have little meaning unless they are recognised by others. Others may not *respect* the claims, but that is in many ways less important than that they *recognize* them formally. Sovereignty is more than anything else a matter of legitimacy. An in the modern world-system, the legitimacy of sovereignty requires reciprocal recognition. Sovereignty is a hypothetical trade, in which two potentially (or really) conflicting sides, respecting de facto realities of power, exchange such recognition as their least costly strategy. Reciprocal recognition is a fundament of the interstate system.

Wallerstein, *World-Systems Analysis*, 44.

Sovereignty norms are now so taken for granted, so natural, that it is easy to overlook the extent to which they are both presupposed by and an ongoing artefact of practice... If states stopped acting on those norms, their identity as 'sovereign' would disappear. The sovereign state is an ongoing accomplishment of practice, not a once-and-for-all creation of norms that somehow exist apart from practice... Indeed, once a community of mutual recognition is constituted, its members... may have a vested interest in reproducing it. In fact, this is part of what having an identity means. But this identity and institution remain dependent on what actors do: removing those practices will remove their inter-subjective conditions of existence.²⁷¹

Crucial for understanding is the manner in which the material interdependence of historical and social *forms* (boundaries; territory) parallel the discursive iterability of *meanings* (Community versus Anarchy; Inside versus Outside).²⁷² Although Wendt criticises World-Systems Analysis for failing to adequately problematise the assumed 'objective' structure of the Capitalist World-Economy, he nevertheless concedes that the Theory moves substantially beyond Structural Realism and towards Critical Theory in its focus upon 'generative structures' and the historically contingent nature of structural relationships.²⁷³ As with 'structuration' theorists such as Wendt and Giddens, World-Systems Analysis understands the interstate system as being 'spatially rather than functionally differentiated'.²⁷⁴

Contrary to the ontological individualism of international political theory, a structurationist theory of international politics cannot treat the presence of a sovereign state as

271 Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', in James Der Derian (ed.), *International Theory: Critical Investigations* (New York: New York University Press, 1995), 129–77 at 151.

272 Walker, *Inside/Outside: International Relations as Political Theory*, 125–40, 169–76. See John G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', *International Organization*, 47/1 (1993), 139–74, *passim*; John G. Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis', *World Politics*, 35/2 (1983), 261–85, *passim*.

273 Alexander Wendt, 'The Agent-Structure Problem in International Relations Theory', *International Organization*, 41/3 (1987), 335–70, *passim*. 'World-System theorists define international system structures in terms of the capitalist world economy which underlie and constitute states, and thus they understand the explanatory role of structures and structuralist terms as generating state actors themselves.' Ibid. 335. See Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', 152–4 for parallels between critical International Relations Theory and Braudel. Ruggie's work is generally held to be the 'best effort to date to conceptualise an ontology of the international system able to incorporate non-sovereign relations between overlapping states.' Darel E. Paul, 'Sovereignty, Survival and the Westphalian Blind Alley in International Relations', *Review of International Studies*, 25 (1999), 217–31 at 229.

274 Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', 412.

something unproblematic; the state, along with all of its defining properties, is generated by structural forces or constituted out of a set of internal relations holding in the system as a whole, which both enable and restrain all further state action.²⁷⁵

As may be readily seen, the pivotal concept of hegemony provides the crucial linkage between World-System and Critical Theory. Hegemony necessarily presupposes the 'holistic' nature of the interstate system, viewing state-actors in radically *relational* terms.²⁷⁶ In remarkably 'Wallersteinian' language, hegemony is

Not merely an order among states. It is an order within a world economy with a dominant mode of production which penetrates into all countries and links into other subordinate modes of production... expressed in universal norms, institutions and mechanisms which lay down general rules of behaviour for states and for those forces of civil society that cut across national boundaries—rules which support the dominant mode of production.²⁷⁷

Furthermore, within international space, non-state actors—including Non-Governmental Organisations (NGOs), Trans-National Corporations (TNCs), and non-institutionalised social classes—are capable of achieving and exerting hegemonic dominance. 'The world can be represented as a pattern of interacting social forces in which states play an intermediate though autonomous role between the global structure of social forces and local configurations of social forces within particular countries.'²⁷⁸

Both World-System and Critical Theory provide the basis for an alternative paradigm of international order premised upon heteronomy, a radical plurality of incommensurable and non-hierarchically situated entities. As a result, both theories point to the 'emergence of new spatial practices [that demand] that we rethink representations of space and our prognoses concerning possible representational spaces.'²⁷⁹ For Ashley, the interpretative 'turn to nonstate actors renders radically unstable any attempt to represent a historical figure—the state or any other—as

275 Bartelson, *A Genealogy of Sovereignty*, 45.

276 Rosenau, 'Before Cooperation: Hegemons, Regimes, and Habit-Driven Actors in World Politics', *passim*.

277 Robert W. Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method', in Stephen Gill (ed.), *Gramsci, Historical Materialism and International Relations* (Cambridge: Cambridge University Press, 1993), 49–66 at 61–2.

278 Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', 225. See Rosenau, 'Before Cooperation: Hegemons, Regimes, and Habit-Driven Actors in World Politics', *passim*.

279 John Agnew and Stuart Corbridge, *Mastering Space: Hegemony, Territory and International Political Economy* (New York: Routledge, 1995), 207.

a pure presence, a sovereign identity that might be a coherent source of meaning and an agency of the power of reason in international society.'²⁸⁰

De Indis constitutes a singular 'textual locus' grounding conflicting pre-modern discourses of 'representational space'. The geography that infuses the Text—both spatial and political—bears a marked resemblance with that of the Critical Theory of Neo-Medievalism. Replicating the political logic of the 'anarchy' of 15th century western Europe,²⁸¹ Neo-Medievalism discursively frames contemporary international relations in radically Post-Structuralist terms: a World-System 'defined by actors of increased *diversity* and *heterogeneity* and characterised by overlapping international authorities and conflicting loyalties.'²⁸² In a more nuanced vein, Friedrichs defines Neo-Medievalism as 'a system of overlapping authority and multiple loyalty held together by a duality of competing universalist claims.'²⁸³

There are at least five empirical correlatives with heteronomy: (i) the regional integration of States,²⁸⁴ giving rise to new forms of multilateral governance; (ii) the 'dis-aggregation' of existing States;²⁸⁵ (iii) the re-legitimation of private international violence;²⁸⁶ (iv) the proliferation of trans-national organisations,²⁸⁷ both public (regional organisations; IGOs) and private (TNCs, NGOs²⁸⁸ and Trans-

280 Richard K. Ashley, 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique', *Millenium*, 17 (1988), 227–62 at 234.

281 'Medieval Europe had never been composed of a clearly demarcated set of homogeneous political units—an international States system. Its political map was an inextricably superimposed and tangled one, in which different juridical instances were geographically interwoven and stratified, and plural allegiances, asymmetrical suzerainties and anomalous enclosures abounded.' Perry Anderson, *Lineages of the Absolutist State* (London: Verso, 1974), 37–8; see also, *ibid.* 32. On the neo-realist political logic of these heteronomous entities, See Markus Fischer, 'Feudal Europe, 800–1300: Communal Discourse and Conflictual Practices', *International Organization*, 46/2 (1992), 427–66, *passim*.

282 Cronin and Leggold, cited in Anthony Clark Arend, *Legal Rules and International Society* (Oxford: Oxford University Press, 1999), 171.

283 Jorg Friedrichs, 'The Meaning of the New Medievalism', *European Journal of International Relations*, 74/2 (2000), 475–502, 481.

284 Bull, *The Anarchical Society*, 255–7.

285 *Ibid.* 257–8.

286 *Ibid.* 258–60. See below, Chapter Three.

287 *Ibid.* 260–3.

288 Ann Marie Clark, 'Non-Governmental Organizations and Their Influence on International Society', *Journal of International Affairs*, 48/2 (1995), 507–25, *passim*.

National Criminal Cartels, or TNCCs²⁸⁹); (v) globalisation and the ‘technological unification of the world.’²⁹⁰

‘Universalist concerns’ is a more nebulous concept, denoting a series of mimetic twenty-first-century ‘functional equivalents’ to the centrifugal institutions of the medieval world system, the *imperium*²⁹¹ and the *sacredotium*.²⁹² For the secular ‘Empire’, Friedrichs suggests the contemporary Nation-State system²⁹³ while for the neo-*sacredotium*, Friedrichs offers the normatively integrationist trans-national market economy; ‘although today there is no functional equivalent to the pope, the world market economy can be interpreted as an avatar of Catholic medieval universalism.’²⁹⁴

Crucially, Neo-Medievalism does not have to refute either the reality or the utility of the Nation-State; it merely has to demonstrate the viability of parallel non-statist forms—which are frequently engaged in dialectical ‘bargaining relationships’ with States²⁹⁵—under the guise of a ‘post-modern’²⁹⁶ understanding of Sovereignty. As Bull has recognised

289 Louise Shelley, ‘Transnational Organized Crime: An Imminent Threat to the Nation-State?’, *Journal of International Affairs*, 48/2 (1995), 463–89, *passim*. See below, Chapter Four.

290 Bull, *The Anarchical Society*, 263–6; Saskia Sassen, ‘The State and Globalization’, in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 91–110, *passim*.

291 John G. Ruggie, ‘Continuity and Transformation in the World Polity: Toward a Neo-realist Synthesis’, *World Politics*, 35/2 (1983), 261–85 at 275.

In sum, this was quintessentially a system of segmental rule; it was anarchy. But it was a form of segmental territorial rule that had some of the connotations of possessiveness and exclusiveness conveyed by the modern concept of sovereignty. It represented a heteronomous organization of transnational rights and claims of public space.

292 Bull defines Neo-Medievalism as ‘a secular reincarnation of the system of overlapping or segmented authority that characterized mediaeval Christendom.’ Bull, *The Anarchical Society*, 264.

293 Friedrichs, ‘The Meaning of the New Medievalism’, 486–8.

294 Ibid. 488–91. See Cutler, ‘Locating Authority in the Global Political Economy’, *passim*.

295 Stephen D. Krasner, ‘Power, Politics, Institutions and Transnational Relations’, in Thomas Risse-Kappen (ed.), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge: Cambridge University Press, 1995), 257–79, *passim*; ‘Institutional structures not actors are the units of analysis, an ontological stance that is inconsistent with conventional actor-oriented power politics approaches including both realism and statism, but which does, nevertheless, focus on power.’ Ibid. 279.

296 Robert Cooper, *The Post-Modern State and the World Order* (London: Demos, 1996), *passim*.

The mere existence in world politics of actors other than the state does not provide any indication of a trend towards a new mediaevalism. The crucial question is whether the inroads being made by these 'other allocations' (to use the mediaevalist's expression) on the sovereignty or the supremacy of the state over its territory and citizens is such as to make that supremacy unreal, and to deprive the concept of sovereignty of its utility and viability.²⁹⁷

Neo-Medievalism reveals, in the most striking manner conceivable, the vital linkages between Sovereignty, legitimacy and geo-culture as contending discursive formations.

The ideational basis of both the nation-states system and the world market economy is socially constructed—the nation-state is rooted in the common world view of a national and international bureaucratic class; and the trans-national economy can rely on the shared ideological beliefs of the managerial class. The world market economy is shaped by a socially constructed ideological pattern of market competition, whereas the modern nation-states system is constituted by the ideology of sovereign statehood. Thus, both the nation-states system and the world market economy can be interpreted as competing but interdependent (and anyway coexistent) hegemonic projects. Or, in other words, the emergent post-international scene is characterized by a dyad of competing, sometimes competing and sometimes conflicting organizational principles—international relations between nation-states and transnational relations between corporations in the world market economy.²⁹⁸

The Post-Structuralist critique of Sovereignty creates a trans-national 'discursive space' permitting the emergence of viable heteronomous sovereignties, the 'free-floating' or radically iterable nature of recognition and legitimacy facilitating an anarchic transference of competing and overlapping authority. Most important is the investiture of *private non-state actors* with Original Personality, particularly the TNC. World-Systems Analysis has always appreciated the centrality of the Corporation or 'Firms' within the practical governance of the Capitalist World-Economy.²⁹⁹ As we shall see in Chapter Four, the emergence of the (early) capital-

297 Bull, *The Anarchical Society*, 264.

298 Friedrichs, 'The Meaning of the New Medievalism', 489–90.

299 'The relationship of states to firms is a key to understanding the functioning of the capitalist world-economy.' This is achieved through State-Corporation co-ordination regarding three vital global economic functions: externalisation of costs, the lawful creation of monopolies and oligopolies; and taxation. Wallerstein, *Modern World-Systems Analysis*, 46, 47–50. Such co-ordinated effort throughout the TimeSpace duration of the Capitalist World-Economy provides additional support for refusing the essentialist dichotomy of State/Market.

Whatever its form, private property and the rights associated with it exist because of the laws and policies of states. While the institution of private property is widespread, and despite clear convergence, the range of discretion over private resources is not

istic mercantile Company—what I de-note as the ‘Corporate Sovereign’³⁰⁰—was both a necessary and a natural entity within the radically heterogeneous global civil society of the 17th century. The implications of a CLS critique of *De Indis*—a Text authored to advance the trans-national interests of the Dutch East India Company, an early progenitor of the TNC—are obvious. The uncanny convergence between pre-modern and post-modern discursive formations effectively belie any notion of either Grotius or the ‘Grotian Heritage’ as a transparent signifier of judicial modernity or progressive internationalism. The revisionist work of Osiander,³⁰¹ Philpott,³⁰² and Teschke³⁰³ demonstrating the continuity of the Westphalian System with archaic and sectarian juro-political practices, such as quasi-feudalistic dynastic succession as the basis for territoriality, have thoroughly refuted the biases of the English School in re-presenting Westphalia as a global signifier of progressive Rationality. What is now required is a critical exegesis of the Grotian Text on a purely *discursive* level. The great historical incongruity of *De Indis* is that a Text that operates to legitimate the international personality and authority of a ‘primitive’ or pre-modern institutional form has been illicitly appropriated as a link in a chain of signifiers invoking the Presence of Liberalism. To adequately de-construct both the Text and the ideological system that it serves, a radically critical inter-textual approach is needed, one that is thoroughly grounded upon the temporality of the composition of the Text.

VI *Histoire Evenementielle*/Primitive Legal Scholarship and *Histoire Structurale*/Early Modern World-System: Vitoria, Suarez, Gentili, and Grotius³⁰⁴

In Kennedy’s historical taxonomy of international legal discourse, the Grotian Heritage is classified as one particular example of Primitive Legal Scholarship (c.1500–1648). From a critical theory perspective, *De Indis*, now unfamiliarly categorised as a ‘primitive’ Text, may be re-interpreted as a textual expression of a newly emergent form of early modern global governance; an ‘event’ express-

identical everywhere. The reasons for the differences lie in the history of capitalism in each national context and the relationship between capital controllers and the state.

Jeffrey A. Winters, ‘Power and the Control of Capital,’ *World Politics*, 46/3 (1994), 419–52 at 452.

300 See below, Chapter Four.

301 Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth,’ *passim*.

302 Daniel Philpott, ‘The Religious Roots of Modern International Relations,’ *World Politics*, 52 (2000), 206–45, *passim*.

303 This is one of the main argumentative thrusts of Teschke in his *Myth of 1648*.

304 Although a number of major primitive scholars populate Grotius’ ‘universe of texts,’ such as Vasquez (d. 1559), de Soto (1495–1560), Bodin (1529–96), Ayala (1548–1584) and Baldus (1327–1440) this thesis will follow Kennedy’s lead in restricting discussion to these four.

ing a 'conjuncture' contained within a 'structure'.³⁰⁵ Although Kennedy does not employ the term, Primitive Legal Scholarship is a juridical example of the wider discursive formation of Scholasticism.

This method, which was first fully developed in the early 1100s, both in law and theology, presupposes the absolute authority of certain books, which are to be comprehended as containing an integrated and closed body of doctrine; but paradoxically, it also presupposes that there may be both gaps and contradictions within the text: and it sets as its main task the summation of the text, the closing of gaps within it, and the resolution of contradictions. The method is called 'dialectical' in the twelfth-century sense of that word, meaning that it seeks the reconciliation of opposites.³⁰⁶

Primitive Legal Scholarship replicates all of the central features of Scholasticism, both in its resolution of analytical and synthetic approaches and in its iterability between legal and theological discourse. Accordingly, there is a Naturalist-derived collapse of Law into Morality.

Unlike traditional scholars, primitive scholars do not distinguish between legal and moral authority, national and international law, or the public and private capacities of sovereigns... The primitives develop elaborate distinctions between various types of law—civil, natural, divine, etc., but they are differences of form or concreteness, not of binding power... Similarly, natural law and international law are not distinguished.³⁰⁷

International public order is invested with a 'normative holism'—in Boyle's terms, a 'deep normative order'—that provides International Law, as the formal discourse of such an order, with an underlying and unifying Presence.

The primitives do not distinguish municipal law from international law, nor the law which binds sovereigns in their relations with their citizens. The primitive text envisions a single law which binds sovereigns and citizens alike. Propositions of civil law about self-defence are easily transposed into discussions of inter-sovereign relations. Both are governed by the same moral-legal order. Although the primitive may suggest that sovereigns and citizens are bound by different rules (the sovereign may have a higher duty to inquire into the justice of war, for example, than the citizen), he generally does not differentiate between two spheres of legal competence and activity... Such differences as exist seem to flow from differing capacities within a unified moral-legal system.³⁰⁸

305 Koskenniemi, *From Apology to Utopia: The Structures of International Legal Argument*, 52–83. See below, Chapter Three.

306 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 131. See *ibid.* 141–2.

307 David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27/1 (1986), 1–98 at 7–8.

308 *Ibid.* 8.

Primitive Legal Scholarship, therefore, constitutes a *discourse*; each writer within this tradition inhabits a ‘universe of *langues* that gives meaning to the *paroles* that he performs in them.’ As Pocock elaborates

This by no means has the effect of reducing the author to the mere mouthpiece of his own language; the more complex, even the more contradictory, the language context in which he is situated, the richer and more ambivalent become the speech acts he is capable of performing, and the greater becomes the likelihood that these acts will perform upon the context itself and induce modification and change within it.³⁰⁹

It is important to note that, in regard to *langue* as the precondition for *parole*, primitive legal scholars relied upon *two* distinct, or ‘competing’ forms of Natural Law theory. Alberico Gentili (1552–1608) operated within the Aristotelian tradition, which classified Natural Law as *habitus* or *socialitas*, a recurrent or dispositional pattern of human behaviour (*impetus naturalis*), universally demonstrated.³¹⁰ For Aristotle and the Civic Humanists of the 15th century, the universe is grounded upon an anthropocentric form of metaphysics, which we would label as ‘thin’ ontology;³¹¹ ‘The natural world is a uniform and harmonious creation in which the constitution of every individual part reflects the structure of the whole. Man, as an integral and exalted part of that world, is built to the same specifications as the universe.’³¹² Other primitive scholars operating within the Catholic tradition, such as Francisco Vitoria (1480–1546) and Francisco Suarez (1584–1617), adopt the theocentric approach of Thomism, grounded upon a ‘thick’ ontological classification of *ius naturale* as a direct emanation of *lex aeterna*: ‘Since all things which are subject to divine providence are regulated by the Eternal law... it is clear that all things participate to some degree in that law, in so far as they derive from it a certain inclination to those actions and aims which are proper to it.’³¹³ In Derridean terms, we would say that ‘thick’ ontology invests Being with a radically greater degree of Presence than does ‘thin’ ontology. While Aristotelianism clearly relies upon the transcendental—that is, the true ‘meaning’ of the profane world is guaranteed by criteria that are not wholly empirical—it nevertheless

309 J.G.A. Pocock, *Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press: 1985), 5.

310 Anthony Pagden, ‘The Preservation of Order: The School of Salamanca and the *Ius Naturae*’, in F.W. Hodcroft et al. (eds), *Mediaeval and Renaissance Studies on Spain and Portugal in Honor of P.E. Russell* (Oxford: Society for the Study of Medieval Language and Literature, 1981), 155–66 at 159.

311 See below, Chapters Three and Four.

312 Pagden, ‘The Preservation of Order’, 157; Jeanine Quillet, ‘Community, Counsel and Representation’, in J. H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), 520–72 at 528–31.

313 Pagden, ‘The Preservation of Order’, 159.

places far less reliance than does Thomism upon the determinant operation of the supra-sensory realm (i.e. 'God'). The shift to *lex aeterna* signifies the transition of *ius naturale* from the Social to the 'onto-theological', the 'science of Being and God as regulative presences'.³¹⁴ As Brierly sententiously declared: Grotius was 'above all else a theologian'.³¹⁵

Furthermore, the metaphysical 'turn' of Scholasticism facilitates a wholly derivate and un-critical reliance upon classical authority, resulting in the total abnegation of authorial originality.

Primitive Legal Scholarship connects legal authority and doctrinal results in a direct and unproblematic fashion. Specific authoritative propositions about peace, justice or the natural order are linked unproblematically with doctrines. The doctrines are valid because the authoritative propositions are valid. Relatively little energy goes into interpretation—even less into methodological elaboration or argument. Typically, if primitives criticize each other at all, they begin with a statement of their opponent's doctrinal position and an assertion that it is wrong. They then elaborate a connection between some principle or some authority and their preferred solution, leaving the reader to dismiss the false view once the true connection has been carefully made.³¹⁶

Prima facie, this may appear to render invalid a central tenet of this book, the under-appreciated parallels between seventeenth- and twenty-first-century international legal discourse. The Text's 'embeddedness' within Primitive Legal Scholarship would seem to preclude the applicability of Koskeniemi's binary model of Apology/Utopia, engendered precisely through that apparent elimination of Naturalism from legal discourse which, in turn, serves as the hallmark of both 'traditional' (1648–1900) and 'modern' (1900–2004) International Law.³¹⁷ Detailed examination of *De Indis* will yield two objections to this preliminary scepticism.

Firstly, to the degree that Grotius effected a 'secularisation' of International Law, it may prove necessary to draw a more subtle distinction between the primitive and traditional stages of legal scholarship; the 'epistemic discontinuity' be-

314 Spivak, 'Translator's Preface', xlviii.

315 J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1995), 19.

316 Kennedy, 'Primitive Legal Scholarship', 5–6.

317 Ibid. *passim*. On this very point, See Kennedy, *International Legal Structures*, 203, for his discussion of Grotius and Selden.

In their self-assured tone and in their moral and political certainties, these debates seem archaic and antiquated, even quaint. They seem to belong to a different form of society, a barter society of rural yeomen, a society in which free individuals encountered each other in simple, human interactions: in short, the world ideologically portrayed in the great contractarian social theories of the Renaissance and Enlightenment. Our moral and intellectual interest is stirred by these debates, though their archaism makes our practical relationship to their ideas, at best one of nostalgia.

tween the two phases may be less absolute than Kennedy implies. Secondly, and far more importantly, it will be shown that even within an arguably 'primitive' Text there are discernible traces of the quintessentially modern 'discursive oscillation'. Here, iterability is not between the meta-level antinomies of Apology and Utopia but within a 'micro-' or 'restrictive' oscillation between contending sub-discourses within Naturalism, namely the rhetorical competition between 'thick' and 'thin' ontology which directly equate to Thomist *lex aeterna* and Aristotelian *habitus* respectively. There is no 'true' Grotian metaphysics; there is only an alternating 'thickening' and 'thinning' of ontology, a rhetorical effect achieved precisely through this discursive oscillation between the contending poles or antinomies. *De Indis* shall be read as a 'dangerously supplemental' Text (that is, neither foundational nor self-grounding), premised upon four cardinal antinomies, each signifying 'micro'-shifts between 'thick' and 'thin' ontology: these are Scholasticism/Civic Humanism, *imperium/dominium*, *mare liberum/mare clausum*, and Piracy/Privateering.

The discursive oscillations between the respective poles will also be shown to inhabit the specific 'arche-trace' of the World-Economy;³¹⁸ this logically implies that the intelligibility of Grotian doctrine and the (neo-) colonialist amnesia of mainstream legal scholarship cannot co-exist within a single textual reading. The 17th century constituted a qualitatively distinct phase within the global evolution of the Modern World-System,³¹⁹ witnessing the 'fracturing' of trans-national legal space and the accompanying birth trauma of the colonialist interstate system. The rise of an authentically 'inter-national' plane corresponded to a discursive shift from 'thick' towards 'thin' ontology, *habitus* largely—albeit not completely—supplanting *lex aeterna* and statist Apology marginalising globalist Utopia.³²⁰ Although Wallerstein has focussed the greater part of his efforts on the late 19th and 20th centuries, the time-frame when the Modern World-System attained the zenith of its development under the British and the American hegemonic periods, it is fairly simple to project some of his most critical theoretical insights backwards into the 16th and 17th centuries, the conceptually distinct 'pre-Modern' phase of the World-Economy.

From this perspective, Primitive Legal Scholarship can be interpreted as a logically necessary juro-political construct discursively correlative with the practical requirements of an 'early' or 'primitive' system of geo-governance, with the historically requisite form of geo-culture resulting from the violent transition from Portuguese/Iberian to Dutch hegemonic periodicity.³²¹ Although by no

318 "Writing"... is the name of the structure always already inhabited by the trace.' Spivak, 'Translator's Introduction', xxxix.

319 Carl A. Hanson, 'The European "Renovation" and the Luso-Atlantic Economy, 1560–1715', *Review*, IV/4 (1983), 475–530 at 476–87.

320 This was finalized in Vattel's 'proto-positivist' doctrine of *ius voluntarium*. Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: The Macmillan Company, 1962), 156–64; Grewe, *The Epochs of International Law*, 358–60 and 374–7.

321 See below, Chapter Four.

means identical with contemporary Liberalism, a critical deconstruction of *De Indis* reveals that the foundational precepts of Natural Law perform the essential universalist functions of later nineteenth- and twentieth-century geo-culture as outlined by Friedrichs. Classical International Law expressly postulates a unitary language of juro-political discourse predicated upon Objectivism and Formalism (re. Unger), permitting the coordinated execution of effective hegemonic governance/trans-national dispute resolution under the rubric of universally applicable self-legitimizing juridical axioms: the ubiquitous 'clusters of rules' as expression of a normative holistic order.³²²

It would constitute a fundamental error in methodology, however, to categorise ('dismiss?') Grotius as merely a 'proto-Realist', and re-subsume the singular contingencies of the Grotian Heritage/Moment under the self-serving stereotyping canons of the British School. A more subtle critical historicist reading uncovers a more nuanced play of inversion of hierarchies and of *differance* within the earlier hegemonic periods, as is evidenced by early modern Natural Law and the seminal Texts of Primitive Legal Scholarship. Far from displaying an orthodox Realist fixation upon the operational centrality of the unitary Nation-State, *De Indis* in fact exhibits a thoroughly heteronomous concern with a multiplicity of legal identities and personalities; the Nation-State, if present at all within the Text, merely constitutes a singular example of trans-national juro-political actor. This anti-statist 'deconstructive heteronomy' is, in fact, perfectly consistent with the Derridean 'logic of heterogeneity' of the 'early' Modern World-System of the 'long' 16th century; the 'State', as a relative new-comer to the international arena, was merely a recent addition to a host of stock characters. The early Modern World-System and, through it, early modern Capitalism, although predicated upon a single over-arching division of labour, nevertheless constituted an internally coherent network of multiple polities, not by happenstance but as 'obverse sides of the same coin.'³²³

Nothing else better exemplifies how Natural Law performed the function of policing normative holism in the 16th and 17th centuries that Liberalism has performed from the 19th to 21st centuries. Given the particular historicist configurations of the World-System, Natural Law, in competition with its main contempo-

322 Alexandrowicz has hinted at a possible world political intent on Grotius' part; 'it is usually overlooked by historians of the law of nations that *Mare liberum* is an important source for the appreciation of the dominion of the law of nations in the sixteenth and seventeenth centuries.' C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967), 44. Although space does not permit an extended discussion, it is interesting to note that the two pioneering nation-states of the 'Scientific Revolution', a pivotal event in geo-culture of the Modern World-System, were the first two successful hegemons, the United Provinces and the United Kingdom. One must wonder whether the epistemological preference for Objectivism and Formalism that underlay both Primitive Legal Scholarship and early modern Science constituted a single disciplinary matrix.

323 Wallerstein, 'The Inter-State Structure of the Modern-World System', 89.

rary ideological rival Civic Humanism,³²⁴ proved itself best adapted to express the juro-political imperatives of a heterogenous Modern World-System polyarchy of early-state, sub-state, and non-state actors. The de facto hegemonic ‘responsibility’ of geo-governance devolved upon Natural Law as the discursive legitimation of trans-national order in the absence of a practicable world-empire/*imperium*. Precisely because European/core zone hegemony was only commencing in the 16th century, the universal exportation of the Nation-State system had not yet been effected by the time of the Grotian Heritage. Core zone hegemons were, in conjunction with a plethora of non- and pre-State actors, units, territories, and empires (e.g. ‘India’; ‘China’; ‘the East Indies’), effectively belaying the applicability, or even the relevance, of the Realist statism.

Grotius’ discursive continuity with Primitive Legal Scholarship is underlined through the role of each scholar in legitimating his respective ‘polity’s’ position within the World-Economy. Like Kennedy, Grewe classifies Grotius as the final representative of a qualitatively distinct early phase of International Law—the Spanish Age—corresponding to a unique rhetorical deployment of Naturalism.

The most famous name in international law in the Spanish Age remains that of the Dutchman Hugo Grotius. It is, nevertheless, justified to call this epoch the ‘Spanish’ Age of international law because the ideas held by the States which fought against Spain were not only marked by the colour of this age but also entangled in a polemical dependence on Spanish ideas and concepts. Grotius’ famous treatise on the Freedom of the Seas [*Mare Liberum*]³²⁵ is a classic example of this relationship.³²⁶

Herein, ‘the colour of this age’ historically corresponds to the political logic of hegemonic periodicity prevailing between ‘Iberia’ (Portugal and Spain) and the United Provinces, textually signified by the discursive transition from a ‘pure’ Naturalism to a more conditional one, rhetorically mediated by selective tactical movements towards the ‘repressed’ pole of secular Civic Humanism.

Furthermore, the material historicity of global interaction was the World-Economy; that is, ‘private’ or ‘economic’ entities, such as the incorporated Regulated or Joint-Stock companies themselves effected vital international political transactions and were, therefore, accredited with either a partial or a plenary form of legal personality. During the Grotian Moment, Holland/the United Provinces did not globally construct a single polity (i.e. an ‘empire’), but a multi-polity of both public/political and private/economic sovereignties and quasi-sovereignties. The oligarchic Dutch ‘State’ and its juro-political counterpart the VOC, governed, with variable levels of effectiveness, a plurality of trade-networks, international commercial entities, and military outposts, with all of the most vital of ‘characterising’ statist functions, such as war-making and treaty-signing, being

324 See below, Chapters Three and Four.

325 A surreptitiously selective edited version of C. XI of *De Indis*, published separately in 1609. For discussion, see below, Chapter Seven.

326 Grewe, *The Epochs of International Law*, 24.

actively shared between them. *De Indis* thus presents us with the textual/juro-political embodiment of the Derridean 'play' of endlessly iterative hierarchies of Metaphysics/Presence. The textualist contours of the allegedly 'modern'—and 'progressive'—Grotian Heritage corresponding perfectly to the inherent, and irreducible, pluralism of the early Modern World-System. In intellectual terms, the British School has misidentified Grotius as the historical signifier of an hegemonial ideological system; far from serving as the harbinger of some kind of 'humane governance', Grotius is the tireless advocate of virtually all of the most 'illiberal' characteristics of sixteenth-century geo-governance, most notably the (quasi-) sovereignty of trans-national trading corporations; the radical privatisation of international political authority and legal personality; the quasi-statist functionality of organised crime; and the furtherance of the colonialist dispossession of Indigenous Peoples.

Ironically, the early modern phases of the World-System may be usefully juxtaposed to the current 'post-modern' phases, with U.S. hegemony coalescing into an 'informal empire',³²⁷ effecting a comparative 're-unification' of international space and accompanied by a regressive discursive shift away from Apology and back towards Utopia; in other words, the 'repeat and renewal' of Naturalism in the current guise of Liberal Millenarianism. Central to both seventeenth- and twenty-first-century realities is the duality of international legal discourse: the indeterminacy of rhetorical patterns neatly recapitulates, albeit in a non-deterministic manner, the historical and material parameters of the objective contradictions of the respective phase of the World-System. It is the central purpose of this thesis to historically 'ground' the operational tenets of the CLS critique of International Law through a close critical reading of a seminal Text that acted as a discursive template of a pivotal moment in the formation of contemporary international public order. It is now necessary to situate *De Indis* within the proper context of its historical 'horizon'.

327 For a recent and highly persuasive presentation of this thesis, See Andrew Bacevich, *American Empire: The Realities and Consequences of U.S. Diplomacy* (Cambridge, Mass.: Harvard University Press, 2002).

Chapter Three

Arche-trace (I)/Imperium:

Holland as Hegemon within the Early Modern World-System

I Grotius and *L'histoire Evenementielle*

Huig de Groot presents the improbable figure of a singular author who writes two parallel but incommensurable Texts. Grotius' careerism and opportunism, including his passive complicity in the judicial murder of his patron Oldenbarnevelt,¹ are well known and have been dealt with exhaustively elsewhere.² The

1 Jan den Tex, *Oldenbarnevelt*, 2 vols, ii (Cambridge: Cambridge University Press, 1973), 666–8. For an illuminating recent discussion of the 'chameleon-like' nature of Grotius, see Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999), 128–39 and W.S. Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925), 191–2: Grotius 'himself was not, and never had been, merely a philosopher of the armchair in disposition and fact. By nature he loved, and was most comfortable in, association with people of rank and importance, negotiating either their business or that of a ruling class.'

2 C. G. Roelofsen, 'Grotius and the International Politics of the Seventeenth Century', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 100, 97 and 97–8:

Ambition, primarily political ambition, seems the mainspring of young Grotius' activities, both as lawyer and as publicist... [Grotius] never considered himself as an 'author', but continually aspired to higher office... While it would be an exaggeration to describe Grotius' interest in international law as merely incidental to his role in Dutch and international politics, there would be rather more truth in that than in the converse position, namely, of considering the 'sage of the Delft' as the impartial jurisconsult of mankind in accordance with his declaration in the Prolegomena.

See Tadashi Tanaka, 'State and Governing Power', in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 122–46 at 123. To a great degree, the 'controversy' surrounding Grotius' chameleon-like behaviour is reflective of the 'bad conscience' that International Law has concerning itself. G. Ladreit de Lacharriere, 'The Controversy Surrounding the Consistency of the Position Adopted by Grotius', in T. M. C. Asser Instituut (ed.), *International Law and the Grotian Heritage* (The Hague: T.M.C. Asser Instituut, 1985), 207–13, *passim*.

It would seem ironic, contemptuous, heretical even, to the man whom we so rightly credit with the 'genius of generality', the originator of a purely axiomatic system of

issue that does need to be addressed in this regard is the extent to which careerist opportunism accounts for the ambiguity of Grotian discourse.³ For Nablusi

The nature of Grotius' character is central: his reality as an intellectual Houdini and servant of the powerful is not a detail to be mentioned in biographical sketches, or rejected as mere 'cynicism'. Rather, this characteristic needs to be emphasised in order to present an authentic tradition which relies on moral, ideological, and intellectual ambivalence.⁴

The task here is to interpret the *discursive* significance of the author's transversal of both public and private legal spaces, as Latin Historiographer of Holland (appointed 1601) and Fiscal-Advocate of the United Provinces (1607) as well as a political affiliate of Die Heeren XVII, the executive board of directors of the United/Dutch East India Company.⁵ The dyadic Texts in question, *De Indis* and the *Commentarius on Theses XI*, share the same premise: the legal status of the Dutch Revolt against Spain (1555–1609)⁶ as *bellum iustum*. Both Texts appear to have been written at the same time,⁷ their mutual composition constituted

reasoning, to attribute to him the flexibility of the advocate or the subtlety of the causer. But, above all, this controversy expresses a two-fold aspiration or a two-fold nostalgia—for an international law which determines the way States behave, and for the independent jurist proclaiming this law to an attentive and compliant government.'

Ibid. 213. The language here is unconsciously invocative of Kennedy's critique of the repressed 'will to power' of international legal scholarship; see above, Chapter One.

3 Nablusi, *Traditions of War*, 128–38.

4 Ibid. 139. It also affects our understanding of Grotius' notorious 'eclecticism'; 'Indeed, the abiding image of Grotius the man reminds that of an intellectual escape artist, famous for getting out of many a tight spot by relying upon a great number of books.' Ibid. 129.

5 'Both his personal connections with the Company and the position of his home town may have influenced Grotius. In Holland Delft was together with Amsterdam the town most notably influenced by the Company 'interest'. C.G. Roelofsen, 'Grotius and the Development of International Relations Theory: "The Long Seventeenth Century" and the Elaboration of a European States System', *Grotiana*, NS 18 (1997), 97–120 at 113. See Den Tex, *Oldenbarnevelt*, ii, 663.

6 Immanuel Wallerstein, *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974), 201–11.

7 'The genesis of the *Commentarius* might be placed as early as 1603–1608, that is approximately into the time of Grotius' writing of the *De Jure Praedae*'. Peter Borschberg, 'Critical Introduction', in Hugo Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, ed. Peter Borschberg (New York: Peter Lang, 1994), 15–199 at 197. For Borschberg, the presence of a distinctive watermark—the crowned eagle of the staff of the Bishop of Basel—indicates a simultaneous composition. Ibid. 41–2. Van Ittersum has criticised the conclusiveness of this evidence but agrees that both texts were composed at about roughly the same time. Martine Julia van Ittersum, 'Hugo Grotius in Context:

a single act of writing, or *écriture*. Of even greater significance is the apparent thematic discontinuity between the dyadic texts: the *Commentarius* expressly restricts *bellum iustum* to public authority,⁸ while *De Indis* is premised upon the legality of private international violence. The fact that a single author, simultaneously engaged by two employers of incommensurable legal status—Corporation and Government— should concurrently produce two Texts on the same subject predicated upon diametrically opposed assumptions, is in itself remarkable. Even more so are the discursive implications of this authorial alterity. The vital issue here is not, as has been traditionally assumed, Grotius' careerism in attempting to fulfil contradictory objectives, but the deconstructionist *grandeur* of re-configuring the international juridical landscape so as to permit the untrammelled operation of both public and private organised violence. The 'Grotian Heritage' of International Law is little more than a superimposition upon the trans-national domain of the domestic political, constitutional and property arrangements of the Dutch Republic, effected through a systematic conflation of *ius gentium* with *ius civile*.⁹ Through the discursive formation of *De Indis*, the emergent Capitalist World-Economy is to be re-constituted following the contours of both 'private' corporate governance and 'public' republican constitutionalism. Neither Text manifests an authorial intent to convey the World-System through representational language; rather, both works are suffused by the 'Presence' of the internal political and economic logic (the arche-trace) of nascent intra- and interstate systems.¹⁰

II Privateering and Booty

The composition of *De Indis* was prompted by the privateering of the Portuguese carrack the *Santa Catarina* in the Strait of Malacca on 25 February 1603 by the Dutch admiral Jacob Heemskerck, Grotius' own cousin.¹¹ The total value of the prize was in excess of three million Dutch guilders.¹² The seizure of the carrack

Van Heemskerck's Capture of the Santa Catarina and its Justification in *De Jure Praedae* (1604–1606); *Asian Journal of the Social Sciences*, 31/3 (2003), 511–48 at 542–4.

8 Ibid. 137–8.

9 Gary Ulmen, 'Towards a New World Order: Introduction to Carl Schmitt's *The Land Appropriation of a New World*', *Telos*, 109 (1996), 3–27 at 17–19.

10 Charles Wilson, 'Hugo Grotius and His World', in R. Feenstra (ed.), *The World of Hugo Grotius (1583–1645)* (Amsterdam: APA-Holland University Press, 1984), 1–14, *passim*.

11 Described in Grotius, Hugo, [*De Indis*] *De Iure Pradae Commentarius. Comentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (Wildy & Sons: London, 1964), 306–17. See also C. G. Roelofsen, 'Grotius and State Practice of His Day', *Grotiana*, NS 10 (1989), 3–46, *passim*, and Van Ittersum, 'Hugo Grotius in Context', 514–20 and 526–34.

12 The *Catarina* was condemned as 'a good and just' prize by the Dutch Admiralty Court on 9 September, 1604. J.H.W. Verzijl, *The Law of the Maritime Prize* (Part

itself may have served as the immediate cause of the formation of the VOC, the joint-stock corporation serving the politically useful function of coordinating the smaller, disparate and less efficient privateering operations of independent provincial Dutch traders. Apart from facilitating intrastate formation within the allegedly 'united' Dutch provinces,¹³ the incorporation of 'The Company' heralded a new phase in Luso-Dutch interstate rivalry, marking a shift in Dutch naval tactics from purely defensive to largely aggressive military and para-military operations. That same year, VOC captain Steven van der Hagen was ordered by the Company to suspend purely mercantile operations and initiate military action against both the Portuguese and Spanish vessels, and to open diplomatic communiqué with all indigenous authorities in vital port and coastal regions (Cambay, Calicut, Dubhol, Kandy) who might be interested in entering into an anti-Iberian military alliance. From 1606 until 1609, with the entry into force of the Twelve-Year Armistice with Spain, all VOC admirals were expressly instructed by Jan Company 'to enter into military alliances and contracts with as many local princes as possible and to offer military assistance to those who wanted to drive the Portuguese out.'¹⁴ Not only did the VOC create an entire network of collaborationist local rulers ('compradors') the Company effectively monopolised the exercise of all formal Dutch state-action within the Indian Ocean world economy.

Although there is no general consensus concerning the authorial motive for composition,¹⁵ *De Indis* is generally interpreted as a legal brief legitimating the seizure of the *Santa Catarina*.¹⁶ Until recently, the Text has been viewed as doubling as an extended reasoned exercise in moral suasion against the powerful bloc of Anabaptist and Mennonite shareholders whose theological pacifism led them to question the legitimacy of Privateering as a means of furthering other-

IX-C of *International Law in Historical Perspective*) (Dordrecht: Kluwer, 1992), 10. See Van Ittersum, 'Hugo Grotius in Context', *passim*.

13 See below, Chapter Five.

14 Neils Steensgaard, *Carracks, Caravans and Companies: The Structural Crisis in the European-Asian Trade in the Early 17th Century* (Denmark: Studentlitteratur, 1973), 244–45.

15 See below, Chapter Seven.

16 Van Ittersum has usefully discussed the multi-faceted juro-political nature of the text, which unevenly combines elements of both legal memorandum and political pamphlet.

Although *De Jure Praedae* cannot be called a legal brief in the technical sense of the word—it is half theory, half apology—the manuscript does exemplify the classical principles of forensic rhetoric formulated by Cicero and Quintilian. Its representation of events always serves to justify Dutch trade and privateering in the East Indies.

Van Ittersum, 'Hugo Grotius in Context', 513–4. It has been conclusively shown that *De Indis* was never actually submitted in the pleadings concerning the *Santa Catarina*. C. G. Roelofsen, 'Some Remarks on the "Sources" of the Grotian System of International Law', *Netherlands International Law Review*, 30 (1983), 73–80, *passim*.

wise acceptable endless capital accumulation.¹⁷ The composition of *De Indis* was not centred upon the parochial objective of legitimating Privateering per se, but upon the wider act of *apologia*; providing 'symbolic validation'—or, in the more cynical alternative, 'ideological mystification'—of the United Province's shift towards maritime predation as a calculated strategy of hegemonial rivalry.¹⁸

Both the composition of *De Indis* and the later significance awarded it as a landmark of international legal discourse are inextricable from the contemporaneous dual transformation of the Modern World-System: the shift of the European core zone from Lombardy/Mediterranean to the northwest/Atlantic, and the self-aggrandizing transition of regionally bounded sub-system to the globally encompassing Capitalist World Economy.¹⁹ However, 'new' intra- and interstate systems were wholly derivative from an earlier heteronomous system of sovereign and quasi-sovereign personalities. The political landscape inhabited by *De Indis* is a profoundly alien one by contemporary state-centric standards, with its exhaustive identification of Original Personality with national agency. By 1500, Europe consisted of a *multiversum* of competing sovereign forms: the Papacy,²⁰

17 This interpretation has been powerfully critiqued by Martine van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (Leiden: Brill, 2006), 167–77. Although she un-categorically rejects the 'Mennonite theory' of composition, van Ittersum does make an interesting aside that she chooses to remain unexplored: 'The alleged Mennonite *crise de conscience* only existed in the [mind] of Oldenbarnevelt.' Ibid. 167–8. If I am correct in arguing that Grotius' relationship with the *lands-advocaat* is of central importance for interpreting his writings, then van Oldenbarnevelt's subjective perceptions, even if wholly ungrounded, may have constituted adequate reasons for composition. See below, Chapters Five and Seven.

18 From the perspective of the VOC, the Admiralty verdict of lawful prize had settled all the legal aspects of the case. They realized, however, that it would take more than a verdict to win widespread political support for their cause, both domestically and internationally. They needed Grotius to advertise Portuguese iniquity to an audience that was not privy to Amsterdam courtrooms or the assembly hall of the Estates of Holland—potential allies like the kings of France and England, for example, and the Estates of Utrecht, Overijssel, Gelderland, Friesland and Groningen.

Van Ittersum, 'Hugo Grotius in Context', 524.

19 On the spatial demarcations of world economies and world systems, see Fernand Braudel, *The Perspective of the World* (vol. iii of *Civilization and Capitalism 15th – 18th Century*) (New York: Harper & Row, Publishers, 1984), 21–45.

We may deduce that a world-economy is a sum of individualized areas, economic and non-economic, which it brings together; that it generally represents a very large surface area (in theory the largest coherent zone at a given period, in a given part of the globe); and that it usually goes beyond the boundaries of other great historical divisions.

Ibid. 24.

20 Hendrik Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems Change* (Princeton: Princeton University Press, 1994), 34–57.

the City- Leagues (the Hansa),²¹ the Italian communes/city-states,²² the Imperial Free-City States,²³ the Holy Roman Empire,²⁴ feudal principalities (for example, the Duchy of Burgundy), and the 'international' regulatory and joint-stock trading companies. All of these followed a strict logic of non-territoriality and none were easily reconcilable with the modern requirements of 'statist' structure. In this regard, the pre-modern nature of the Grotian Text is the faithful reproduction of contemporary international relations:²⁵ the 'main "source" of the Grotian system is to be found in the author's experience of international relations and his extensive knowledge of contemporary diplomatic history.'²⁶

III *Respublica Christiana*: The European World System

The iterability of the Capitalist World-Economy establishes the operational determinacy of micro-level local causation. Therefore, it is necessary to shift attention from the macro-level of the interstate Modern World-System and towards the micro-level transformation of the pre-1500 European world system/sub-system, in order to acquire a greater appreciation of the complex and delicate nexus governing the discursive emergence of *De Indis*. Prior to the rise of the Modern World-System, Europe, like the other regional trading blocs of the world (the Indian Ocean; Ming China; Moghul India) formed a 'sub-system' or local 'world' economy of its own.²⁷ The structural transformation of (western) Europe from a sub-system to a 'true' or 'modern' World-System was the replication on the interstate plane of the triumph on the micro-level of an ascendant form of early/pre-industrial Capitalism over an entrenched feudal order. The 'core' of this sub-

21 Ibid. 109–29.

22 Ibid. 130–50.

23 Ibid. 118–20 and 172–78.

24 Ibid. 114–17.

25 Roelofsen, 'Grotius and State Practice of His Day', 16 and 44–6.

26 Roelofsen, 'Some Remarks on the "Sources" of the Grotian System of International Law', 79.

27 A 'sub-world' system does not have to be truly global, merely 'larger than any juridically-defined unit.' Wallerstein, *The Modern World-System I*, 15. Although there is inconsistency of usage, the capitalised and hyphenated 'World-System' refers to the integrated interstate system flowing from the establishment of the global Capitalist World-Economy achieved by the western European core zone states during the 'long' 16th century. The small case unhyphenated 'world system' denotes the earlier regional economies that, while pre-global, exhibited the required elements of political integration and hierarchical subordination among the differentiated economic components so as to constitute a true 'system.' The European world system, however, was unique among all of the various sub-systems being subject to an *inherently unlimited expansionism*. See Robert Bartlett, *The Making of Europe: Conquest, Colonization and Cultural Change 950–1350* (Princeton: Princeton University Press, 1993), 5–23 and 243–68.

system was Lombardy, especially the principal city-states of Milan, Florence and, most importantly, both Genoa and Venice.²⁸

Parallel to this structural transformation was the shift away from traditional military and political patterns of 'territorialism' to a new configuration of state-war-market relations.

Central to [the European sub-system] is the definition of 'capitalism' and 'territorialism' as opposite modes of rule or logic of power. Territorialist rulers identify power with the extent and populousness of their domains and conceive of wealth/capital as a means or a by-product of the 'endless' pursuit of territorial expansion [T-M-T]. Capitalist rulers, in conflict, identify power with the extent of their command over scarce resources and consider territorial acquisition as a means and a by-product of an 'endless' accumulation of capital [M-T-M]... The differences between the two logics can also be expressed in terms of the metaphor of the states as 'containers of power'.²⁹ Territorialist rulers tend to increase their power by expanding the size of the container. Capitalist rulers, in contrast, tend to increase their power by piling up wealth within a smaller container only if it is justified by the requirements of the accumulation of capital.³⁰

Vital to the transformation of the European world system into the Modern World-System were an inter-locking set of institutional changes within the core states of the pre-modern system, initially centred in Venice, 'the true prototype of the capitalist state', which most successfully co-joined the 'twinning' activities of war- and state-making; that is, the self-sustaining internalisation of protection costs.³¹ The monopolistic capitalism of the oligarchic regime³² compelled Venice to seek a more sustainable cost-benefit alternative to territoriality. This was achieved through a dogmatic reliance upon strict balance of power considerations,³³ the Communes effectively thwarting the expansionist ambitions of both

28 William H. McNeill, *The Pursuit of Power: Technology, Armed Force, and Society Since A.D. 1000* (Chicago: University of Chicago Press, 1982), 63–116; Edwin S. Hunt and James M. Murray, *A History of Business in Medieval Europe, 1200–1550* (Cambridge: Cambridge University Press, 1999), 87–90.

29 See Anthony Giddens, *The Nation-State and Violence* (Cambridge: Polity Press, 1985), 13.

30 Giovanni Arrighi, 'The Three Hegemonies of Historical Capitalism', *Review*, 13/3 (1990), 365–408 at 372.

31 See below, Chapter Seven.

32 'If there has ever been a state whose executive met the Communist Manifesto's standard of the capitalist state ("but a committee for mapping the common affairs of the whole bourgeoisie") it was fifteenth century Venice.' Ibid. 373. For Braudel, 'to say central zone or capitalism is to talk about the same reality.' Braudel, *The Perspective of the World*, 57.

33 Wilhelm G. Grewe, *The Epochs of International Law* (New York: Walter de Gruyter, 2000), 19–22; Herbert Butterfield, 'The Balance of Power', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International*

the Empire and the Papacy.³⁴ The complimentary reliance upon naval superiority and mercenary troops underwrote a viable self-sustaining 'protection-producing industry,' enabling the transformation of organized forms of violence into a long-term source of revenue.³⁵

IV Original Accumulation and Systemic Cycles of Accumulation

'To me Genoa seems to have been, in every age, the capitalist city par excellence.'
(Braudel)

In Part Eight of the first volume of *Capital*, revealingly entitled 'So-Called Primitive Accumulation,' Marx identifies Renaissance Lombardy as the birth-place of Capitalism: 'Although we come across the first sporadic traces of capitalist production as early as the fourteenth or fifteenth centuries in certain towns of the Mediterranean, the capitalist era dates from the sixteenth century.'³⁶ He argues that

in Italy, 'where capitalist production developed earliest, the dissolution of serfdom also took place earlier than elsewhere... When the revolution which took place in the world market at about the end of the fifteenth century had annihilated northern Italy's commercial supremacy, a movement in the reverse direction set in,'³⁷ allowing him to conclude that the 'prelude to the revolution that laid the foundation of the capitalist mode of production was played out in the last third of the fifteenth century and the first few decades of the sixteenth.'³⁸

Marx's insights on the necessary and vital linkage between original accumulation and the world-historical origins of the Capitalist World-Economy are of the

Politics (London: George Allen & Unwin, 1966), 132-48 at 133-8; J.S. Watson, *The Evolution of International Society: A Comparative Historical Analysis* (New York: Routledge, 1992), 160-2.

34 'The balance of power among the emerging dynastic states of Western Europe was instrumental in preventing the logic of territorialism from nipping in the bud the rise of capitalist logic within the European system of rule.' Arrighi, 'The Three Hegemonies of Historical Capitalism,' 373-4.

35 Ibid. 374:
[Enough] money circulated in the richer Italian towns to make it possible for citizens to tax themselves and use the proceeds to buy the services of armed strangers [mercenaries]. Then, simply by spending their pay, the hired soldiers put these monies back into circulation. Thereby, they intensified the market exchanges that allowed such towns to commercialise armed violence in the first place. The emergent system thus tended to become self-sustaining.

36 Karl Marx, *Capital: A Critique of Political Economy. Volume One*, with Introduction by Ernest Mandel, trans. Ben Fowles (London: Penguin Books, 1990), 875-6.

37 Ibid. 876 n. 1

38 Ibid. 878.

greatest possible relevance to World-Systems Analysis.³⁹ In *The Long Twentieth Century*, a seminal work of World-Systems Analysis, Arrighi has identified as vital nexuses within the temporal wave of *la longue duree* select conjunctures that he labels 'systemic cycles of accumulation'.⁴⁰ In late feudal Europe, networks of capital accumulation 'were embedded in and subordinate to' non-economic networks of pre-capitalistic political and military power. It was the inversion within *histoire conjuncturelle* of the hierarchical relationship between the antimonious networks that constituted the temporal implementation of 'the Long Cycle'. Every conjunctural transformation of the Capitalist World-Economy 'has proceeded through a series of systemic cycles of accumulation each consisting of an (MC) phase of material expansion followed by a (M) phase of financial expansion'.⁴¹ Here, 'M' de-notes Money, which signifies both the liquidity of assets and the flexibility of economic choice and behaviour; 'C' de-notes Capital, which signifies manufacture/productivity and a strategy of economic fixity. The internal temporal sequence of each systemic cycle is constituted by a precise 'series of lifts', each lift being the

result of the activities of a particular complex of governmental and business agencies endowed with the capacity to carry the expansion of the capitalist world-economy one step further than the promoters and organizers of the preceding expansion could or would. Each step forward [sic] involves [an]... 'organizational revolution' in the process of capital accumulation.⁴²

For a number of different reasons, northern Italy was historically favoured to serve as the geo-spatial locus of that first systemic cycle of accumulation that

39 Marx in *Capital*, as interpreted by Braudel, is essential to resolving one of the long-standing problems in World-Systems Analysis, that is, of providing both a coherent and convincing explanation for the temporal emergence of Capitalism that is the Self-Same of the current *longue duree*. 'I am therefore in agreement with the Marx who wrote (though he later went back on this) that European capitalism—indeed, he even says capitalist *production*—began in thirteenth century Italy.' Braudel, *The Perspective of the World*, 57. For Arrighi, the

reorientation of the search for origins [of the Modern World-System] advocated by Braudel is in my view necessary in order to fill in the truly 'missing link' in Wallerstein's theory of the modern world-system—namely, a plausible account of the competitive pressures that have promoted and sustained the capitalist transformation of the European world economy.

Giovanni Arrighi, 'Capitalism and the Modern World-System: Rethinking the Non-debates of the 1970s', *Review*, 21/1 (1981), 113–29 at 125. To simplify somewhat, the critical variable separating contemporary neo-Marxists and World-Systems Analysts is the dispute over Circulationism versus Productionism as the sign of Capitalist Modernity'. See below, Chapter Five.

40 Arrighi, Giovanni, *The Long Twentieth Century* (London: Verso, 1994), 85–96.

41 Ibid. 86.

42 Ibid. 87.

lead to the break-through emergence of Capitalism. Firstly, the political organisation of the Italian communes—the *stato* system—clearly constituted a regional or sub-world system in its own right.⁴³ The ideological and juro-political innovations of this sub-system—including Civic Humanism and Republicanism, along with Capitalism—were fully capable of both being ‘exported’ abroad and providing for the practical organisation and governance of a much wider geo-spatial domain.

The city-states, in other words, became a model not just for the individual units of the emergent system of national states but also for the [European] system as a whole. From this perspective, the most important transition in the formation of the modern world is not from feudalism to capitalism but from an interstitial capitalist formation embedded in a system of city-states to a world capitalist system embedded in a system of nation-states.⁴⁴

Secondly, Lombardy was the site of a near constant inter-state warfare of exceptional violence and ferocity. Apart from re-enforcing the ideological development of republican and humanist discourses as a form of ‘nationalism’,⁴⁵ internecine warfare proved a stimulant to the first systemic cycle in two ways: wars stimulated both political organisation and technological innovation and served as an indispensable outlet for the investment of surplus value.⁴⁶ This form of ‘military Keynesianism’⁴⁷ enabled the city-states to indefinitely postpone the onset of an otherwise debilitating inflationary spiral and resultant economic contraction. The Italian spectacle of surplus mobile capital manifesting itself through the form of large armies leads directly to the third vital factor: the acceleration and intensification of political and military rivalry among the emergent Nation-States of western Europe. The integration of mobile capital into the vital centre of the political system of the European world system, premised upon institutionalised warfare, compelled all early Nation-States to alter their political networks so as to guarantee the maintenance of an adequate production of surplus value: the effective subordination of the political and military power networks to the economic network of ceaseless capital accumulation.

According to Arrighi, the first, or ‘Genoese’, systemic cycle of accumulation was a binary phenomenon, the two variants historically represented by the two leading *stado* of the city-state system, Venice and Genoa. The temporally prior

43 Garrett Mattingly, *Renaissance Diplomacy* (Harmondsworth: Penguin Books, 1955), 77–94. ‘In the 1440s there began to form in certain Italian minds a conception of Italy as a system of independent states, co-existing by virtue of an unstable equilibrium which it was the function of statesmanship to preserve.’ Ibid. 77.

44 Arrighi, ‘Rethinking the Nondebates of the 1970s’, 127–8.

45 See below, Chapter Five.

46 For a discussion of warfare as a form of capital creation rather than capital destruction, see below, Chapter Seven.

47 Arrighi, *The Long Twentieth Century*, 38.

Venetian variant constituted the first and purest form of monopoly capitalism, a capitalistic economy that was thoroughly integrated into a highly centralized system of political control.⁴⁸ The slightly later 'Genoese' model came with the establishment in 1407 of the first 'multinational consortium', the *Casa di San Giorgio*.⁴⁹ This 'organisational revolution' accomplished two things: it finalised the political de-centralisation of the Genoese *stato* and it committed the Genoese economic and political networks to the preferential economic policy of international finance Capitalism.⁵⁰ For Arrighi, a 'double movement' between innovative and retrogressive elements invariably constitutes the secular conjunctural shifts between successive systemic cycles.

The evolution of historical capitalism as a world system did not proceed in a linear fashion, that is, through a series of simple forward movements in the course of which old organizational forms were superseded once and for all by new ones. Rather, each forward movement has been based on a revival of previously superseded organizational forms.⁵¹

That is, the systemic shifts are *non*-dialectical.

Within the first systemic cycle, this double movement was signified by the differential approach towards the internalisation of costs, in particular the costs of *protection*.⁵² By means of monopoly Capitalism the Venetians were enabled to internalise military expenditures, which ultimately served to secure their political autonomy. The Genoese, because of their institutionalised practice of financial Capitalism, were compelled to externalise their protection costs; the political weakening of the *stato* incurred by the formation of the Genoese 'super-companies' resulted in an effective 'privatisation' of the political decision-making process, undermining the ability of the commune to coordinate military policy and expenditure effectively. In a highly dangerous manoeuvre, the Genoese opted to act as 'free-riders' to the concentrated territorialist powers of France and Iberia. Throughout the 15th century the Genoese were able to deftly exploit liquidity and

48 Ibid. 146–9.

49 Braudel, *The Perspective of the World*, 157.

50 Arrighi, *The Long Twentieth Century*, 109–17.

51 Ibid. 149.

52 Ibid.

'Venetian and Genoese regimes of accumulation developed along divergent trajectories, which in the fifteenth century crystallized into two opposite elementary forms of capitalist organization. Venice came to constitute the prototype of all future forms of "state (monopoly) capitalism", whereas Genoa came to constitute the prototype of all future forms of "cosmopolitan (finance) capitalism". The ever-changing combination and opposition of these two organizational forms and, above all, their ever-increasing scale and complexity associated with the 'internalisation' of one social factor after another, constitute the central aspect of the evolution of historical capitalism as a world-system.'

mobile capital as a means of defraying domestic military costs through securing an unstable fusion of cosmopolitan finance with statist territorialism.

The Genoese entered into an organic relationship of political exchange with Iberian territorialist organizations as the most reasonable way—if not the only way—in which to bypass the limits imposed on the expansion of their capital by the closing in on their trade networks of Ottoman, Venetian, and Aragonese-Catalan power... [T]his course of action was highly successful... [but]the price of this success was a further weakening of the state- and law-making capabilities of the Genoese government. This weakening, in turn, left the Genoese cosmopolitan (finance) capitalism hostage to the territorialist tendencies and capabilities of its Iberian allies and vulnerable to the resurgence of state (monopoly) capitalism in a more complex and powerful form.⁵³

Accordingly, it was within the second systemic cycle of accumulation, this conjuncture centred upon Holland, that constituted the ‘Dutch revival’ of the earlier and superseded Venetian model of monopoly capitalism. The resuscitation of Venetian statist Capitalism by the economic and political elites of Amsterdam and The Delft was not accidental; it was an historically necessary act within the economic and political logic of the now ‘globalised’ early Capitalist World-Economy. The Dutch cycle, therefore, ‘repeats’ the double movement of the Genoese cycle by restoring, in a decidedly un-dialectical manner, the earlier ‘suspended’ form of capitalist accumulation and production.

Capitalism only triumphs when it becomes identified with the state, *when it is the state*. In its first great phase, that of the Italian city-states of Venice, Genoa and Florence, power lay in the hands of the moneyed elites. In seventeenth-century Holland the aristocracy of the Regents governed for the benefit and even according to the directives of the businessmen, merchants, and money-lenders. Likewise, in England⁵⁴ the Glorious Revolution of 1688 marked the accession of business similar to that in Holland.⁵⁵

The master sign of the second/Dutch systemic cycle is the full internalisation of protection costs,⁵⁶ realised through the monopolisation of the lucrative ‘Baltic trade’ in combination with self-sustaining maritime predation against Iberia. Crucially, the successful internalisation of protection costs was realised through two pivotal Dutch innovations: the chartered joint-stock company and a perma-

53 Ibid. 149–50.

54 The geo-spatial locus of the third systemic cycle of accumulation.

55 Fernand Braudel, *Afterthoughts on Material Civilization and Capitalism* (Baltimore: Johns Hopkins University Press, 1977), 64–5.

56 ‘The differences between the two cycles are many and complex but they can all be traced to the fact that the Dutch regime of accumulation, in comparison with and in relation to the Genoese, internalised protection costs.’ Arrighi, *The Long Twentieth Century*, 144. For further discussion, see below, Chapter Seven.

nent stock exchange, the Bourse.⁵⁷ Both organisational innovations, operative within the trans-national paces of the Capitalist World-Economy, constituted 'powerful instruments of global expansion of Dutch commercial and financial networks, and from this point of view their role in the overall strategy of accumulation of the Dutch cannot be emphasized enough'.⁵⁸ It was precisely this integration of a truly cosmopolitan system of finance Capitalism with the self-sustaining rate of protection cost internalisation that served as the organisational basis of the second systemic cycle of accumulation. The consummation of the second cycle had two decisive effects upon both the intra-state and inter-state systems that trans-versed the Dutch Republic. In terms of the intra-state system, Republicanism became the hegemonic mode of political discourse, but precisely because the economic network of the Republic was a heterogenous mixture of monopolistic and financial capitalist structures, the precise *constitutional* form that the State should take—centralised or de-centralised (or, in the alternative, 'strong' or 'weak') remained un-decided.⁵⁹ In inter-state terms, the statist United Provinces, thoroughly integrated with the monopolistic VOC, were compelled to project their own heterogenous constitutional arrangements outwards as a means of effectively regulating the entirety of the juro-political landscape of the Capitalist World-Economy; 'by taking the political organization of commercial space into their own hands, the Dutch could bring the capitalist logic of action to bear on protection costs in the extra-European world'.⁶⁰

Throughout the remainder of this book I will be arguing that it is this exact 'double movement' between the inter- and intra-state levels of juro-political discourse within the conjunctural time wave of the Dutch cycle that constitutes *l'histoire evenementielle* of the 'Grotian Moment'. Grotius' 'apologetic' efforts for the VOC constitutes a discursive formation that operates within the arche-trace of that primitive system of global governance that is temporally and structurally identical with the second systemic cycle of accumulation.

[The VOC] 'duplicated' in the Indian Ocean the state (monopoly) capitalism in which the Dutch merchant elite had already practised successfully in Europe. In the Indian Ocean, as in Europe, the decisive weapon wielded by the Dutch in the struggle for wealth and power was exclusive control over a regionally specific supply—grain and naval stores in the Baltic, fine spices in the Indian Ocean trade—and in both instances, the acquisition and retention of this exclusive control rested on the development of a self-reliant and competitive war- and state-making apparatus.⁶¹ It was this duplication of state (monopoly) that enabled the Dutch merchant elite, poised at the commanding

57 Ibid. 138.

58 Ibid. 139–40.

59 See below, Chapter Five.

60 Ibid. 152.

61 So effective, in fact, that the Spanish demanded the dissolution of the VOC as an indispensable precondition for the de jure recognition of Dutch national sovereignty. See below, Chapter Seven.

heights of the Dutch state and of the 'parastatal' VOC,⁶² to carry systemic processes of capital accumulation further than the cosmopolitan (finance) capitalism of the Genoese merchant elite had been able to do. Like the Genose and unlike the Venetians, the Dutch broke out of the straightjacket of regional commerce to 'maximize' profits on a world scale. But like the Venetians and unlike the Genoses, [the Dutch] never externalised protection costs and thus *could bring an economizing logic of action to bear on commercial expansion in the extra-European world.*⁶³

In terms of the broader historical evolution of the Modern World-System, the Dutch cycle is of special significance in two ways. With the successful global implementation of the capitalist logic of power, territorialism is discursively delegitimated, both as a normative principle and as an effective model for international political economy. In terms of Deconstruction, the absence of territorialism—or, in the alternative, the presence of Capitalism—serves as the constitutive *différance* of the heterogenous Modern World-System. The Capitalist World-Economy is

marked by a hierarchy: the area is always a sum of individual economies, some poor, some modest, with a comparatively rich one in the centre. As a result, there are inequalities, differences of voltages, which make possible the functioning of the whole. Hence, that individual division of labour... [that] Marx did not foresee... is not in fact a 'new' division, but an ancient and no doubt an incurable divide, one that existed long before Marx's time.⁶⁴

The absence of the unifying territorialist world-empire and the presence of the untrammelled operational political and economic logic of Capitalism places warfare and organised violence at the very centre of the Modern World-System produced by the Dutch systemic cycle of accumulation.⁶⁵ It is precisely this symbiotic convergence between Capitalism and warfare within the Modern World-System that constitutes the express linkage between the Capitalist World-Economy and the colonality of power.⁶⁶ The classic account this phenomenon has been provided by McNeill.

Within the cockpit of western Europe, one improved modern-style army shouldered hard against its rivals. This led to only local and temporary disturbances of the balance of power, which diplomacy proved able to contain. Towards the margins of the European radius of action, however, the result was systematic expansion—whether in India, Siberia or the Americas. Frontier expansion in turn sustained an expanding trade

62 See below, Chapter Four.

63 Ibid. 155–6. Emphasis added.

64 Braudel, *The Perspective of the World*, 26.

65 Ibid. 57–67.

66 See above, Chapter One.

network, enhanced taxable wealth in Europe, and made support of the armed establishment less onerous than would otherwise have been the case. Europe, in short, launched itself on a self-reinforcing cycle in which its military organization sustained, and was sustained by, economic and political expansion at the expense of other peoples and polities of the earth.⁶⁷

This brings us to our other major concern: that the second systemic cycle of accumulation—the foundational conjuncture of the Modern World-System—is identical with the global implementation of original accumulation. Throughout Section Eight of Volume One of *Capital* Marx establishes a series of mutually re-enforcing linkages between Colonialism and original accumulation, which collectively make up a single movement towards the finalisation of Capitalism through the worldwide mechanisms of forcible expropriation.

The only thing that interests us is the secret discovered in the New World by the political economy of the Old World, and loudly proclaimed by it: that the capitalist mode of production and accumulation, and therefore capitalist private property as well, have for their fundamental condition the annihilation of that private property which rests on the labour of the individual himself; in other words, the expropriation of the worker.⁶⁸

As ‘Holland was the model capitalist nation of the seventeenth century’,⁶⁹ it is the master-signs of the Dutch systemic cycle that act as the constitutive marks of Capitalism.

The colonial system ripened trade and navigation as in a hothouse. The ‘companies called Monopolia’ (Luther) were powerful levers for the concentration of capital. The colonies provided a market for the budding manufactures, and a vast increase in accumulation which was guaranteed by the mother country’s monopoly of the market. The treasures captured outside Europe by undisguised looting, enslavement and murder flowed back to the mother country and were turned into capital there. Holland, which first brought the colonial system to its full development, already stood at the zenith of its commercial greatness in 1648.⁷⁰

If we continue with our de-constructive reading of Section Eight of *Capital*, modified by the lenses of the anti-teleological and heterogenous logic of World-Systems Analysis, we will be able to formulate a subversive reading of Marx on precisely this point: that original accumulation is nothing other than cosmopolitan finance Capitalism. As Marx himself demonstrates, the relationship between the two economic forms is one of iterability.

67 McNeill, *The Pursuit of Power*, 143.

68 Marx, *Capital*, Volume One, 940.

69 Ibid. 916.

70 Ibid. 918.

Today, industrial supremacy brings with it commercial supremacy. In the period of manufacture [the 'mercantilist' 17th century] it is the reverse: commercial supremacy produces industrial predominance. *Hence the preponderant role by the colonial system at that time.* It was the 'strange god' who perched himself side by side with the old divinities of Europe on the altar, and one fine day threw them all overboard with a shove and a kick. It proclaimed the making of profit as the ultimate and sole purpose of mankind.⁷¹

Marx's 'strange god' is the signification of both Capitalism and the resultant process of ceaseless capital accumulation. Original accumulation, now the self-same of the colonality of power, is itself the historical process whose ascendancy is signified by the 'organisational revolution' of the Dutch systemic cycle of accumulation. One of Marx's favourite, and most famous, examples of colonality-as-original-accumulation is the institutional innovation of the 'national debt'.

The system of public credit, i.e. of national debt, the origins of which are to be found in Genoa and Venice as early as the Middle Ages [sic], took possession in Europe as a whole during the period of manufacture. The colonial system, with its maritime trade and its commercial wars, served as the forcing-house for the credit system. *Thus it first took root in Holland.* The national debt, i.e. the alienation of the state—whether that state is despotic, constitutional or republican—marked the capitalist-era with its stamp. The only part of the so-called national wealth that actually enters into the collective possession of the modern nation is the national debt... *The public debt becomes one of the most powerful levers of primitive accumulation.* As with the stroke of the enchanter's wand, it endows unproductive money⁷² with the power of creation and thus turns it into capital, without forcing it to expose itself to the troubles and risks inseparable from its employment in industry or even in usury.⁷³

At this juncture, it is critical to recall Arrighi's vital observation concerning the 'double movement' governing the secular succession of all systemic cycles. Through the iterability between original accumulation and the colonial difference, we are in a much better position to understand the process of so-called 'primitive' mechanisms of capital accumulation as something that has, in a decidedly un-dialectical manner, been both superseded and retained throughout all of the non-teleological sequences of the non-systemic cycles. Once again, the essentialist demarcation between the 'Modern' and the 'Pre-Modern' is de-constructed.

71 Ibid. Emphasis added.

72 Marx's designation of money as inherently 'unproductive' signifies the metaphysical essentialism that grounds his notorious division between true/use value and false/exchange value. If Liberalism is haunted by the spectre of Revolution, then Communism is haunted by the spectre of the 'Post-Real'.

73 Ibid. 919.

V The Capitalist Logic of Power and Hegemonic Transition

The main engine driving the historical transformation of the Modern World-System encapsulated within *la longue duree* of Capitalism has been the uninterrupted process of 'hegemonic transition'.⁷⁴

It has been the cyclical rise and fall of hegemonic powers that has provided the crucial degree of equilibrium to the inter-state politics of the modern world-system, thereby enabling the process of capital accumulation to proceed without serious hindrance. A hegemony that lasted too long would have pushed the system towards its transformation into a world-empire.⁷⁵ And a system that never saw the emergence of a hegemonic power would not have had the possibility of creating the stable interim order needed to maximize accumulation.⁷⁶

A recurrent chain of signifiers has marked each hegemonic cycle, which is the juro-political corollary of a separate and distinct cycle of accumulation.

The functioning of the Modern World-System has been dependent on three intentional phenomena: a relatively stable inter-state system, of which the system of hegemonic cycles has been the motor; a highly profitable world [-economy] production system of which the monopoly cycles... have been the motor; and the social cohesion of the sovereign states, especially those that are in the core zone.⁷⁷

74 Giovanni Arrighi and Beverly J. Silver, 'Capitalism and World (Dis)Order', in Michael Cox, Tim Dunne and Ken Booth (eds), *Empires, Systems and States: Great Transformations in International Politics* (Cambridge: Cambridge University Press, 2001), 257–79, *passim*.

75 Which was the precise fate of the Dutch Republic. See below, Chapter Eight.

76 Immanuel Wallerstein, 'The Inter-State Structure of the Modern-World System', in Steve Smith, Ken Booth and Marysia Zalewski (eds), *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), 87–107 at 102.

If the disequilibrium in the international system is not resolved then the system will be changed, and a new equilibrium reflecting the redistribution of power will be established [...] The disequilibrium in the international system is due to increasing disjuncture between the existing governance of the system and the redistribution of power in the system. Although the hierarchy of prestige, the distribution of territory, the rules of the system, and the international divisions of labour continue to favour the traditional dominant power or powers, the power base on which the governance of the system ultimately rests has eroded because of differential growth and development among states. This disjuncture among the components of the international system creates challenges for the dominant states and opportunities for the rising states in the system.

Robert Gilpin, *War & Change in World Politics* (Cambridge: Cambridge University Press, 1981), 186.

77 Wallerstein, 'The Inter-State Structure of the Modern World-System', 102–3.

Historically, there have been four hegemonic powers within the Modern World-System, all of them taking the form of the modern Nation-State: Iberia (1494–1618); the United Provinces (1618–c.1740); Great Britain (1815–1914); and the United States (1945–?). Each *longue duree* has been marked by a progressive enlargement in the scale of surplus extraction from the Periphery to the Core, measured in both relative and absolute terms.⁷⁸ Each hegemonic cycle has been ‘book-ended’ by a ‘thirty-year world war’ (1494–1527; 1618–1648; 1792–1815; 1914–1945) followed by a juro-political act of symbolic validation—ordinarily a peace or ‘legitimizing settlement’ of some kind—marking a formal transition to a new re-configuration of the interstate system;⁷⁹ the Treaty of Tordesillas for the ‘Italian Wars’ (1494–1527); the Peace of Westphalia for the ‘Spanish Wars’ (1618–48); the Congress of Vienna for the ‘French Wars’ (1792–1815); and the settlements of Versailles and Potsdam for the ‘German Wars’ (1914–45).

This historically precise sequence of ‘symbolic validation’ works to guarantee the legitimacy of the inter-state system through serving as the juridical expression of the strategy of politically calculated self-restraint that underlines hegemonic International Law.⁸⁰ ‘Strategic restraint’, formally expressed through the mechanisms of inter-governmental organisations and binding institutionalism⁸¹ of the British⁸² and American systemic cycles⁸³ replaces through integration the balance of power approach of the Dutch cycle.⁸⁴ The historical logic of this sequence of ‘successful’—meaning relatively peaceful—hegemonic cycles is not an accidental one but is the exact one mandated by the structural logic of the institutional arche-trace of the Modern World-System. All three ‘true’ hegemonies have been liberal polities, the most successful capitalistic Nation-State within their

78 Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (London: Zed Books, 2001), 6–7; Paul Hirst and Grahame Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance*, 2nd edn (Cambridge: Polity Press, 2000), 68–9.

79 George Modelski, *Long Cycles in World Politics* (Seattle: University of Washington, 1987), *passim*.

80 See above, Chapter One.

81 John G. Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (Princeton: Princeton University Press, 2001), 37–44 and 65–9.

82 Ibid. 98–107.

83 Ibid. 199–200.

84 See below, this chapter. When a hegemonic-based international public order is built around institutional binding practices and supranationalism, it is substituting interlocking international constraints for balance-of-power controls as the basic check on concentrated power [world-empire]. The logic of balance is to check power with power; the logic of institutional binding and supranationalism is to restrain power through the establishment of an institutionalised political process by formal legal-authority.

Ibid. 43.

respective cycles; each possessed the most developed form of Capitalism, predicated upon an absolute commitment to Free Trade, and each enjoyed an inherently republican political system.⁸⁵ There is, in fact, extensive historical evidence to indicate that the sequence of systemic succession has been, at least to some degree, deliberately engineered by the inter-penetrating economic and political elites of the respective hegemons. The UP-UK transition/succession has been comparatively under-studied from this perspective. Largely following Marx,⁸⁶ Arrighi contends that the Dutch systemic cycle began to draw to a close beginning circa 1730–40, when Holland switched to an almost exclusive economic policy of cosmopolitan finance in order to secure its diminishing status within the Capitalist World-Economy. This resulted in a marked intensification of economic and financial ties with England, within which Holland was the dominant partner at least until the American War of Independence (1775–1783).⁸⁷ The Treaty of Paris marked the very first phase of overt British hegemony, although it was not completely implemented until the termination of the para-hegemonic French Wars in 1815. In contrast, the UK–USA succession has been extensively studied. Throughout the entire 19th century, English financial elites studiously cultivated American markets as an indispensable dumping ground for unassimilable surplus value.⁸⁸ By 1914, on the eve of the pivotally decisive systemic German Wars,

85 For the United Kingdom as a 'crowned republic', see David M. Craig, 'The Crowned Republic? Monarchy and Anti-Monarchy in Britain, 1760–1901', *Historical Journal*, 46/1 (2003), 167–85, *passim*.

86 Marx himself is in absolutely no doubt as to the essentially *co-ordinated* nature of this succession that lay at the very centre of the historical development of modern, or industrial, Capitalism.

Along with the national debt there arose an international credit system, which often conceals one of the sources of primitive accumulation in this or that people. Thus the villainies of the Venetian system of robbery formed one of the secret foundations of Holland's wealth in capital, for Venice in her years of decadence lent large sums of money to Holland. There is a similar relationship between Holland and England. By the beginning of the eighteenth century, Holland's manufactures had been far outstripped. It had ceased to be the nation preponderant in commerce and industry. One of its main lines of business, therefore, from 1701 to 1776, was the lending out of enormous amounts of capital, especially to its great rival England. The same thing is going on today between England and the United States. A great deal of capital, which appears today in the United States without any birth-certificate, was yesterday, in England, the capitalized blood of children.

Marx, *Capital*, Volume One, 920.

87 Arrighi, *The Long Twentieth Century*, 140–1.

88 Thomas Ehrlich Reifer, 'Globalisation and the National Security Security State Corporate Complex (NSSCC) in the long Twentieth Century', in Ramon Grosfoguel and Ana Margarita Cervantes-Rodriguez (eds), *The Modern/Colonial/Capitalist World-System: Global Processes, Antisystemic Movements, and the Geopolitics of Knowledge* (New York: Praeger, 2002), 1–22 at 4:

[The] entwining of England's world-empire and empire of haute-finance assured Britain the control over the balance of power and world market that underlay its hegemony.

all of the foundations of twentieth-century 'Atlanticism' were in place.⁸⁹ The Anglo-American 'special relationship' was to be erected upon two pillars, one ideological—Protestantism and an expressly racist 'Anglo-Saxonism'—and material: most vitally the extensively networked convergences between London and New York financial and banking houses.⁹⁰ The 'post-imperial' origins of the American systematic cycle of accumulation, therefore, invested US hegemony with the implicit status of 'para-imperial' or 'informal empire.'⁹¹

For all the differences between colonialism and neo-colonialism, they still shared a broad commonality of interests in relation to revolutionary movements in dependent countries [anti-systemic movements] and in relation to [inter-state rivalry]. Empire can be conceived of as a global structuring force or momentum, the management of which passed on to the United States. When the British tradition and model of global elite management was passed on to the United States, it was in the form of inter-locking British-American networks in political, military, communications, financial and economic spheres, as well as in certain structural parallels in terms of policies.⁹²

It is also of decisive importance that all four—the 'failed' Iberia and the wholly 'successful' UP, UK, and USA⁹³—have been predominantly maritime powers; 'the

Not surprisingly, the core base of support for Britain's liberal internationalism lay in the Anglo-American cosmopolitan financial houses forming the axis of the transatlantic circuit of money capital fuelling U.S industrialisation from railroads to the rise of heavy industry.

89 'Late nineteenth-century globalisation and the turn towards militarised overseas expansion by the Anglo-American establishment, based on state-corporate management of the economy with markets guaranteed by arms spending, provided the model for the creation of U.S. hegemony on the enlarged social foundations of The New Deal World Order.' Ibid. 3. For a discussion of the hegemonic significance of the Neo-Keynesian New Deal, see above, Chapter One.

90 Jan P. Nederveen Pieterse, *Empire and Emancipation: Power and Liberation on a World Scale* (New York: Praeger, 1989), 280:

The subsequent shift of the centre of gravity of Anglo-Saxon hegemony from one side of the Atlantic to the other was thus already built into the design of the Anglo-Saxon alliance. The reality of the 'Anglo-Saxon legend' was that in this way a doomed and decrepit empire was inconspicuously transformed into a trans-Atlantic combine of finance capitalism.

Cosmopolitan finance has now been supplemented by the co-ordinated convergence of Anglo-American petroleum interests through the de facto quasi-monopolisation of oil supply. William Engdahl, *A Century of War: Anglo-American Oil Politics and the New World Order Revised Edition* (London: Pluto Press, 2004).

91 Pieterse, *Empire and Emancipation*, 280–91.

92 Ibid. These policies have included the 'pre-emptive' intervention in Iraq.

93 On Iberia's status as a 'failed' hegemon, see below, this chapter. In essence, it is an indispensable prerequisite for hegemony that the hegemonic State be the single most successful in both manipulating and regulating the global capitalist economy.

modern world system is, characteristically and importantly, an oceanic system.⁹⁴ There appears to be a necessary historical correspondence between successful naval mastery and effective interstate hegemony.⁹⁵ As the prototype of Venice clearly demonstrated, thalassocracy has proven most competitively cost-efficient and profit maximizing.

The most significant achievement for each [Nation-State] on the road to hegemony was primacy in productive efficiency within the World-Economy. One of the reasons each was able to achieve this superiority was the fact that it had not invested heavily during [the pre-hegemonic period] in creating a large army. However, each had created a large merchant marine which, in addition to its obvious economic function, supported the ability of this state to sustain a large naval force. It is indeed probably the case that a key factor in the ability of the state that won out in the struggle to achieve hegemony (won out against its major rival) was the fact that it had not invested in a large army.⁹⁶

In other words, in addition to being the most militarily powerful, the hegemon must necessarily be, in both absolute and relative terms, the most successful free-market nation. The historical 'paradox' of Iberia was that both Portugal and Spain militarily succeeded in establishing the material parameters of the World-System but failed to achieve the requisite degree of systemic capitalist transformation, both nationally and globally.

94 George Modelski and William R. Thompson, *Seapower in Global Politics, 1494–1993* (London: Macmillan Press, 1988), 4.

95 Geoffrey Parker, 'Europe and the Wider World, 1500–1750: the Military Balance', in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 161–95, *passim*.

96 Wallerstein, 'The Inter-State Structure of the Modern-World System', 99. 'The great technological "revolution" between the fifteenth and eighteenth centuries were artillery, printing and ocean navigation... Only the third—ocean navigation—eventually led to an imbalance, or "asymmetry" between different parts of the globe.' Fernand Braudel, *The Structures of Everyday Life: the Limits of the Possible* (vol. i of *Civilization and Capitalism 15-18th Century*) (New York: Harper & Row Publishers, 1981), 385. Intriguingly, Hintze has argued that national reliance upon maritime forces, or 'Navalism', facilitates State development through pre-empting the emergence of Absolutism.

A military system whose centre of gravity is in sea power will influence the organization of the State in its own peculiar way, different from the way of the Continental military system [that incorporated the 'failed' hegemons of Iberia and, arguably, France]. Land forces are a kind of organization that permeates the whole body of the State and gives it a military cast. Sea power is only a 'mailed fist' reaching out into the world; it is not suitable for use against some 'enemy within'... Land forces have stood since the beginning in more or less intimate alliance with the propertied classes; they still carry something of a feudal tradition in them. Sea power lacks all feudal vestiges. To an eminent degree it serves the interests of trade and industry. Its place is with the modern forces in life, simply by virtue of the vital importance that technology and capital have

Steinberg has employed the intriguing term of 'force-fields' to signify the taxonomic classification of oceanic space as a material foundation of international public order: 'the sea was an area for collecting and projecting social power but it was not treated as a space of value (or *place*) in its own right'.⁹⁷ The absence of a (relatively) large army was not only cost-effective (re. Venice), but it permitted surplus value to be more profitably re-invested in a Blue Water fleet, itself an indispensable military prerequisite to assert hegemonic control over international transit routes, the material sinews of the World-Economy.⁹⁸

It is significant that *De Indis* is centred upon a sustained dual discussion of both *bellum iustum* (or, 'the Just War') and *mare liberum* (or, 'the Free Seas'), the two foundational pillars of International Law. While all of the other primitive legal scholars tend to focus on either one or the other (predominately the former), it is only Grotius who authors a text that expressly synthesized the two domains. In a deeper sense, *bellum iustum* and *mare liberum* actively enter into a textual symbiotic relationship: the need to protect the Freedom of the High Seas itself serves a legitimate grounds for the Just War; lawful warfare is necessary to preclude the successful imposition of *mare clausum*. The discursive necessity of subjugating oceanic diversity to juridical uniformity underlined the universal transposition of European *bellum iustum* to international order.

De Indis is the textual site of the discursive re-production of the international political dynamic of a World-System hegemon committed to ceaseless capital accumulation and global naval supremacy, the oceans themselves constituting an indispensable geo-spatial correlative of the World-Economy. The High Seas serve as the medium for the successful projection of hegemonic sea power, the

in its development. Sea power is allied with progressive forces, whereas land forces are tied to conservative tendencies.

Otto Hintze, 'Military Organization and the Organization of the State', in id., *The Historical Essays of Otto Hintze*, ed. Felix Gilbert (Cambridge: Cambridge University Press, 1975), 180-215 at 214.

97 Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 69.

98 Wallerstein, 'The Inter-State Structure of the Modern-World System', 99-100:

In each case [of hegemonic transition], the sea(/air)-power defeated the land-based power. In each case, the power committed to maintaining the basic structure of a capitalist world-economy won out against the power that was pushing in the direction of transforming the system into a world-empire [i.e., territorialism]. In each case the thirty years' war itself was the decisive factor in achieving the necessary marked superiority in productive efficiency within the World-Economy as a whole and in particular relative to the main rival [Portugal/Venice; Holland/Portugal-Spain; England/France; USA/Germany-Japan]. In each case, the war itself increased enormously the military strength of the putative hegemonic power. And in each case, the drive to achieve hegemonic status had been a very long process, stretching over many decades at least. The end of each thirty years' war marked a significant stage in the contraction of the inter-state system: the Treaty of Westphalia, the Concert of Europe [Utrecht; Vienna], and the United Nations. Each time, the hegemonic power sought to create an order in the system that would guarantee its economic advantage over the long run.

naval armature policing the politically enabling myriad networks of the World-Economy. Conversely, the High Seas act as a conduit for long-reach maritime commerce and traffic, the economic sinews of the World-System, which both subsidises and encourages further hegemonic penetration into various regional sub-systems. This point was not lost on Grotius.

I know that the very foundations of... Iberian power lie, not in the Low Countries nor in Spain, but in the transoceanic regions from which the said people derive their wealth and the means to maintain their public largess and their wars. But I also know that they have gained for themselves in those distant lands as much hatred as power, and that the Dutch ought to make use of that hatred if they wish to see the war ended. The North must unite with the farthest Orient, in order that the despotism which has spread to every quarter of the world may be overthrown.⁹⁹

With remarkable prescience, Grotius recommends the intentional bankrupting of the Habsburg world-empire as an integral part of Dutch hegemonic strategy.

In [the] future, [the Spanish] will provide us perforce with similar spoils,¹⁰⁰ an alternative which obviously would result in tremendous benefits both for our state and for our private citizens, or else they will be obliged to turn from their attacks upon others in defence of themselves, keeping innumerable ships for their own protection in East Indian waters, strengthening their colonies with fortifications, and (most troublesome of all!) maintaining a suspicious vigil overall things at one and the same time. The numerous and heavy expenses thus to be incurred will drain away not only all the private profits of the Portuguese, but also the whole of the East Indian revenue accruing to their state itself, the unwavering enemy of Dutch liberty. One can readily perceive how extremely profitable both of these consequences will be for our own state. For everyone knows that money constitutes the sinews of war and that, just as it is of the greatest importance [in war] to supply oneself with money, so the precaution of next greatest importance is to prevent the foe from being supplied with it. Accordingly, if all the produce and revenue from Philip's East Indian possessions can be encumbered with a burden of expense equal to that already laid upon certain European possessions of his,¹⁰¹ it must surely follow that the future management of the war will prove much easier for us. For no one can doubt that the aid received from Spain through Italian transactions is the chief means of prolonging that war, inasmuch as the Dutch would long since have brought the affair to a conclusion if their resources had been matched solely against the revenue derived from another part of the Low Countries. If, then, Spanish revenues fail—and with them,

99 Grotius, *De Indis*, 345. For the ramifications of this 'Infidel alliance' see below, Chapter Eight.

100 The *Santa Catarina*.

101 Given the context of the Dutch Revolt, presumably this refers to Flanders, the Netherlands, and Germany.

the credit necessary to procure additional funds—what outcome is to be expected other than a military insurrection leading to a great revolution?¹⁰²

Finally, *De Indis* served as the necessary template for the re-presentation of international juro-political relations through the material historicist medium of hegemonic transition. The internal logic of the interstate political system discursively governing the outward expression of international legal language can be shown, via the prism of Critical Theory, to be one of hegemonic rivalry and exploitative domination, the instrumental reason of military conflict, monopolistic economics, and unlimited capital accumulation.

VI Universalism and *Imperium*

The global scale of hegemonic periodicity has necessitated a corresponding development in the geo-spatial dimension of symbolic validation. Herein, the foundational jurisprudence of International Law has been equated with the ideology of Universalism, invested with all of the attributes of world-historical inevitability; Universalism combines elements of both Apology and Utopia. It is premised upon the empirical reality of a Capitalist World-Economy,¹⁰³ and it expresses the normative claims of global governance, an international theory ‘which maintains that whatever is perceived as the world is or should be regarded as a single integrated entity.’¹⁰⁴ In World-System terms, Universalism is a continuation of the legitimation function of Geo-Culture; ‘the belief in Universalism has been the keystone of the ideological arch of historical capitalism.’¹⁰⁵

During the ‘long’ 16th century, Universalism was expressed through three rival formulations. The first was the ‘world-empire’ of the Habsburg dynasty, ideologically legitimated through the Humanist doctrine of ‘universal society’ and materially empowered through territorialism. The second was the Hieratic theory of papal *plenitudo potestatis*, discursively expressed through a radically Platonic, or ‘Realist’, metaphysics. The third was neo-Thomism, a ‘de-institutionalised’ theory of global governance derived from Natural Law, and which provided the contours of the discursive foundations of the Grotian Heritage.¹⁰⁶ Each variant, in turn, was historically grounded upon the feudal governance institutions of the pre-capitalist European world system, itself a descendant of the earlier *Imperium romanum*.¹⁰⁷

102 Ibid. 349–50. See also, *ibid.* 350–1.

103 Immanuel Wallerstein, *Historical Capitalism* (London: Verso, 1983), 80–6.

104 Harald Kleinschmidt, *The Nemesis of Power: A History of International Relations* (London: Reaktion Books, 2000), 19.

105 Wallerstein, *Historical Capitalism*, 81.

106 Kleinschmidt, *The Nemesis of Power*, 66–7.

107 Ibid. 11–91. See J. S. Richardson, ‘*Imperium Romanum*: Empire and the Language of Power’, in David Armitage (ed.), *Theories of Empire 1450–1800* (Aldershot: Variorum, 1998), 1–9, *passim*.

Imperium, as the juridical expression of a universalist polity, existed in three separate forms: generic, secular (*sacrum imperium*),¹⁰⁸ and papal (*sacerdotium imperium*).¹⁰⁹ The original generic, or 'Roman', form signified 'kingly Power',¹¹⁰ and was identified with the exercise of public magistracy.¹¹¹ A special form of political authority, or *potestas*, *imperium* was ordinarily associated with the exercise of military command as a lawful act of public governance.¹¹² As such, it consisted of three prongs: (i) *ius edicendi*, the power to issue 'executive orders', or edicts;¹¹³ (ii) *iurdictio*, the 'power of setting out the legal principles upon which legal disputes were decided',¹¹⁴ and; (iii) *ius coercendi*, *coercitio maior*, the infliction of punishment.¹¹⁵

The historical development of imperium precisely correlates with the constitutional evolution of the Roman state. With the 'Roman Revolution' of the First Century B.C.E., the Julio-Claudian Dynasty successfully appropriated the pre-existent category of dictatorship—now a permanent feature of Roman politics—and incorporated it into orthodox constitutional governance; 'Like any magistrate with imperium, [the Emperor/*Imperator*] could issue an edict, but, unlike an ordinary magistrate, he held power for life and with worldwide authority so that the imperial edict [*ius edicendi*] had the force of a universal statute.'¹¹⁶ With the replacement of the increasingly unstable (post-) Augustan *Principate* with Constantine's absolute monarchy (the *Dominate*) in the Fourth Century C.E., *imperium* was transformed into *monarchia universalis*, premised upon the juro-

108 Friedrich Heer, *The Holy Roman Empire* (New York: Phoenix, 2003), 65–93.

109 James Muldoon, James, *Empire and Order: The Concept of Empire, 800–1800* (London: MacMillan Press, 1999), 64–86.

110 J.A.C. Thomas, *Textbook of Roman Law* (Amsterdam: North-Holland Publishing Company, 1976), 14.

111 Ibid. 39. *Imperium* was 'the executive power with which every Roman magistrate was invested.' George Mousourakis, *The Historical and Institutional Context of Roman Law* (Aldershot: Ashgate, 2003), 79.

112 Ibid. 79–82. *Imperium*

originated and was properly at home in the military sphere where it meant the absolute power of the commander-in-chief [*imperator*] to issue and enforce orders, a power which existed with respect to the soldiers under his command as well as to the population in the area of military operations. It involved the authority to take any measure of coercion the commander saw fit to take, including corporal and even capital punishment... the concept of imperium was the pivot of all known constitutional thinking.

Hans Julius Wolff, *Roman Law: A Critical Introduction* (Norman: University of Oklahoma Press, 1951), 28.

113 Mousourakis, *The Historical and Institutional Context of Roman Law*, 79.

114 Ibid. 79–80.

115 Ibid. 80.

116 Thomas, *Textbook of Roman Law*, 39.

political norm that 'the peace of the world could only be safeguarded by the existence of a single universal power.'¹¹⁷

By the beginning of the Medieval era, *imperium* became wholly conflated with a personalized notion of *potestas*.¹¹⁸ Under the 'two swords' theory of government,¹¹⁹ *imperium* was divided into two forms, secular and sacred, each variant over time coming to signify a separate category of global governance, the Empire and the Papacy;¹²⁰ 'the main preoccupation of political thought in the High Middle Ages was clearly the relationship between the Church and the secular rulers, and in particular that between the papacy and the empire.'¹²¹ *Sacrum imperium* was identical with global *potestas*, re-formulated in late medieval terms as a territorialist, pre-capitalist 'world-empire.'¹²² By the time of the Grotian Heritage, the House of Habsburg had clearly established itself as sole claimant.¹²³

Papal or sacerdotal *imperium* underwent a more complex evolution.¹²⁴ Premised upon the Christological doctrine of *plenitudo potestatis*,¹²⁵ or the 'pleni-

117 Bernard Guenee, *States and Rulers in Later Medieval Europe* (Oxford: Basil Blackwell, 1985), 7. See J.A.S. Richardson, 'Imperium Romanum: Empire and the Language of Power', in David Armitage (ed.), *Theories of Empire 1450–1800* (Aldershot: Variorum, 1998), 1–9, *passim*.

118 K. Pennington, 'Law, Legislative Authority and Theories of Government, 1150–1300', in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), 424–53, *passim*.

119 J.A. Watt, 'Spiritual and Temporal Powers', in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450*, 367–421, *passim*.

120 James Muldoon, 'Extra Ecclesiam non est Imperium: The Canonists and the Legitimacy of Secular Power', *Studia Gratiana*, 9 (1996), 553–80, *passim*.

121 J.P. Canning, 'Introduction: Politics, Institutions and Ideas', in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450*, 341–66 at 341.

122 Roelofsen, 'Grotius and the Development of International Relations Theory', 99–100:

Even if *de facto* independent dynasts held sway throughout Christendom, they ruled sections of the common Christian people and did not pretend to be rulers of 'independent' political units sufficient unto themselves...The highest aspiration entertained by the Kings of France and England was to supplant in effect the Emperor as the leader of Christianity in its 'just defence' against Islam.

123 See below, this Chapter.

124 Walter Ullman, *Medieval Political Thought* (Harmondsworth: Penguin Books, 1975), 100–15.

125 Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge: Cambridge University Press, 1955), 135 and 138–9; Walter Ullman, *Medieval Papalism: The Political Theories of the Medieval Canonists* (London: Methuen, 1949), 76–114; Robert L. Benson, 'Plenitudo Potestatis: Evolution of a Formula From Gregory IV to Gratian', *Studia Gratiana*, 14 (1967), 195–217, *passim*.

tude of power',¹²⁶ the Papacy proclaimed itself as the 'principal carrier of Roman imperial absolutism',¹²⁷ able to exercise 'universal coercive jurisdiction over the whole world'.¹²⁸ Unlike secular *imperium* that was ultimately dependent upon its territorialist base, sacerdotal *imperium* proved far more insidious precisely because of its nearly exclusive ideological (i.e., anthropologically symbolic) nature,¹²⁹ exercised through ecclesiastical monarchy. 'The most effective instrument of the sacerdotal imperium was neither military force nor Roman regalia but the idea of universal jurisdiction and universal law: God had set a law over the world, and the Roman bishop was the supreme judge [*iurdictio*].'¹³⁰

With Innocent III (1198–1216), papal *imperium* had come to be equated with *monarchia universalis*; for Aquinas, to the Pope 'all the kings of the Christian people are to be subject to our Lord Jesus Christ himself'.¹³¹ In turn, *plenitudo potestatis* proved unworkable outside of the institutionalised papal *curia*, 'the bureaucratic means whereby the papal policy of centralization [over canon law] was put into effect';¹³² the expansionist territorial Papal State(s) of central Italy formed

126 Antony Black, *Council and Commune: The Conciliar Movement and the Fifteenth-Century Heritage* (London: Burns & Oates, 1979).

127 Ibid. 587.

128 Watt, 'Spiritual and Temporal Powers', 417.

129 Ullman, *Medieval Papalism*, 76:

The struggle between pope and emperor could come to a head only when the former was able to put forward claims which made the emperor a mere tool in the hands of his antagonist. These claims, being based upon transcendental ideas were, so to speak, removed from the sphere of sensual evidence and capable of expansion by means of logical speculation. In other words, the arguments of the papal side were weapons against which the imperial side had little to set.

130 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 520. As with all utopian hegemonies, this 'belief was rooted... in the theological conviction that the universe itself was subject to law' Ibid. 536.

131 Thomas Aquinas, *On Kingship: To the King of Cyprus*, with Introduction and notes by Th. Eschmann (Toronto: Pontifical Institute of Mediaeval Studies, 1982), 62. 'In the law of Christ, Kings must be subject to priests' Ibid. 63. Compare Aquinas on this point with the arch-Ghibelline Marsilius of Padua:

The meaning of this title [*plenitudo potestatis*] among the Roman bishops, therefore, is that just as Christ had plenitude of power and jurisdiction over all kings, princes, communities, groups and individuals, so too do those who call themselves vicars of Christ and of St. Peter have this same plenitude of coercive jurisdiction, limited by no human law.

Marsilius of Padua, *The Defender of the Peace: The Defensor Pacis*, trans. with introduction Alan Gewirth (New York: Harper Torchbooks, 1956), 94.

132 Canning, 'Introduction: Politics, Institutions and Ideas', 348.

'a cultural typology which was to serve as a model of excellence for the whole of Europe of the ancien Regime.'¹³³

Under the *pontificalis maiestas* of the pope, who was styled also 'Prince' and 'true emperor', the hierarchical apparatus of the Roman Church tended to become the perfect prototype of an absolute and rational monarchy on a mystical basis, while at the same time the State increasingly showed a tendency to become a quasi-Church or a mystical corporation on a rational basis.¹³⁴

The twin 'swords' of sacerdotal *imperium*, spiritual and profane, effected a correlative bifurcation of *plenitudo potestatis* into the ecclesiological *in spiritualibus* and the territorialist *in temporalibus*, the indirect secular power derived from the direct immaterial power.¹³⁵

The superiority of the spiritual translated immediately into severely juridical terms [*imperium*]. The spiritual power has both to establish the temporal power [*iurisdictio*] and to judge it if it fails to do good [*ius coercendi, coeratio maior*]... the lay power enjoys no authority: the powers are a unity founded upon the supremacy of the spiritual.¹³⁶

The Pope, like the Emperor, reserved the right to exercise the magistrate's function of deposing recalcitrant rulers¹³⁷ and to issue global edicts,¹³⁸ most importantly the issuance of Crusades.¹³⁹

133 Paolo Prodi, *The Papal Prince: One Body and Two Souls: the Papal Monarchy in Early Modern Europe* (Cambridge: Cambridge University Press, 1987), 47.

134 E.H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957), 193–4.

135 Ullman, *Medieval Papalism*, 114–98; James Muldoon, 'Boniface VIII's Forty Years of Experience in the Law', *Jurist*, 31 (1971), 449–77, *passim*.

136 Watt, 'Spiritual and Temporal Powers', 369. See William D. McCready, 'Papal *Plenitudo Potestatis* and the Source of Temporal Authority in Late Medieval Papal Hierocratic Theory', *Speculum*, 48 (1973), 654–74, *passim*. It is important to note that papal *imperium* did not function as practical governance, but merely as *iurisdictio*. According to the arch-hierocrat Innocent IV (1243–54): 'The Pope has jurisdiction over all men and power over them in law but not in fact.' Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990), 45.

137 'The deposition of rulers for non-fulfilment of their duty was the ne plus ultra of sacerdotal imperialism.' *Ibid.* 374.

138 Berman, *Law and Revolution*, 110–11 and 136–7.

139 Ullman, *Medieval Papalism*, 121:

By a logical elaboration of the ideas which first prompted the enterprise of the crusades papal powers and supremacy could be extended so that it might, at least in theory, embrace the whole of what was known as the universe. In other words, the crusades were considered only a stepping stone in the direction of the eventual establishment of a fully fledged world government.

It is obvious why it is Grotius, the 'last' of the primitive legal scholars, who should be selected by the British School as the signifier of 'rational' international public order: he was a Dutch Protestant.¹⁴⁰ The historical connection with Holland cannot be exaggerated in this regard. Grotius' main 'rivals' within Primitive Legal Scholarship (with the significant exception of Alberico Gentili) were all Spanish (Vitoria, Suarez, Vasquez, da Molinas), agents of an historically unsuccessful world-empire. Furthermore, they were all Catholic mendicants. Grotius was a layman and an anti-sectarian, his anti-denominationalism both more compatible with twentieth-century outlooks as well as more directly consistent with the grand constitutional arrangement of separation of Church and State that was perceived to lay at the heart of the 'Westphalian Settlement' (*cuius regio, eius religio*).¹⁴¹ In addition, his position as both an executive in the VOC and as Fiscal-Advocate of the United Provinces forced Grotius to engage in more direct and fruitful ways with the juro-political implications of the economic logic of early Capitalism and the 'pre-Modern' World-Economy. It was his unique affiliation with both a republican government and an international merchant company that provided Grotius to radically re-formulate the late medieval discourse of global governance, a discursive stratagem that textually recapitulated the material shift from European sub-system to Capitalist World-Economy.

VII *Monarchia Universalis* I: Hierocracy

It comes as no surprise that the Papacy had hegemonic pretensions. Like Spain, Rome had developed an entrenched adversarial relationship with the Italian city-states, culminating in the 'Italian Wars' (1494–1527). Although Modelski sets the termination of the 'Italian Wars' in 1516–17 with the establishment of Portuguese military control over Gujarat,¹⁴² it is argued here that 1527 is a more appropriate date, with the Spanish sack of Rome effectively ending any papal pretence to hierocracy. The despoliation of the Eternal City followed directly from the Battle of Pavia, 1525, in which Spanish forces annihilated the French army occupying Lombardy, establishing Iberian domination over the Italian communes, ending the city-state system. It is absolutely crucial to regard the transition from European sub-system to early Modern World-System and the emergence of Iberian hegemony as co-determinants. The Spanish conquest of Italy was paralleled by Vasco da Gama's circumvention of Africa (1497–8), Albuquerque's decisive naval victory over a Muslim fleet at Diu (1509), and the resulting Portuguese territorial conquests of Goa (1510), Malacca (1511), and Hormuz (1515), giving Portugal effective control of all of the geo-strategic points within the Indian Ocean, with the vital exception of Aden on the Red Sea. Simultaneously, Spain undertook the successful incorporation of the Caribbean. Following the original Columbian 'dis-

140 Daniel Philpott, 'The Religious Roots of Modern International Relations', *World Politics*, 52 (2000), 206–45 at 222–45.

141 In fact, the principle was first formally enunciated in the Peace of Augsburg of 1555.

142 Modelski, *Long Cycles in World Politics*, 73.

coveries' of 1492, Portugal 'discovered' Brazil in 1500, and the Spanish overthrew the Aztec/Nahua Empire in 1519–21; Mexico was subdued in 1523. The parallel successes in both the West and East Indies established the foundations of the first truly 'global' World-Economy, a material 'structural arc' linking the two regions.

The Mexican *Conquista* in particular displaced the Mediterranean decisively from a core focus of trade, thus precipitating a long-term marginalisation of the Middle East, reduced the relative indispensability of the Indian Ocean arena, and provided the nascent developing nations of western Europe with the gold and silver they needed, both to settle the long-standing balance-of-payments deficits with the East [i.e. bullion in exchange for preciousities] and to serve as the basis for a rapid accumulation of capital... Capitalism, in the form that took shape in the seventeenth and eighteenth centuries and, even more so, in the nineteenth, might not have 'taken off' so dramatically had the shape of the world system not been transformed in the sixteenth century.¹⁴³

With the simultaneous decline of its great political rival the German *imperium*, Rome was able to give free rein to its geopolitical ambition as *monarchia universalis*, the unlimited projection of its position within the European sub-system outwards into the formative World-Economy. Both Portugal and Spain, as successful crusader-states against the 'Islamic bloc' and the progenitors of the earliest post-Mediterranean phase of the Modern World-System, were quickly appropriated as the 'champions' of the Catholic/Papal cause.

It would be a misleading simplification, however, to postulate a strictly necessary correlation between the Iberian proto-hegemons, Rome, and Catholic theology. Concurrent with the gestation of the Modern World-System came systemic opposition to the 'Papal Revolution' and Roman pretensions to Universal Monarchy.¹⁴⁴ In its most extreme form, political resistance to Roman hegemony took the form of 'heresy' (i.e., Conciliarism) and, during the 16th century, Protestantism, anti-papalism forging a fruitful political alliance with nascent self-determination movements following the collapse of a centralising imperial authority. Simultaneously, and in many respects more important for our purposes, came increasing opposition to *monarchia universalis* within the mainstream of Catholic theology itself, particularly in the form of neo-Thomism.

VIII The Treaty of Tordesillas: *Imperium* as Conveyance of Dominion

The World-System implications of the Late Scholastics can now be placed within the context of the Treaty of Tordesillas between Spain and Portugal, the 'high-water mark' of papal Universalism. The formation of the Treaty (7 June 1494) coincided with the initiation of the 'Italian War' that same year. The Treaty and the Spanish invasion were both orchestrated by the pro-Iberian pope Alexander

143 Janet L. Abu-Lughod, *The World System in the Thirteenth Century: Dead-End or Precursor?* (Washington, D.C.: American Historical Association, 1993), 18.

144 Berman, *Law and Revolution*, 85–119.

VI (1492–1503), whose three bulls *Inter caetera* (3–4 May 1493)¹⁴⁵ served as the textual basis of the Treaty. The potential of *plenitudo potestatis* to act as a dangerous supplement is most clearly revealed in the territorialist papal ‘donation’ of the ‘West Indies’—and, subsequently, the ‘East Indies’ as well—to the Iberian principalities, an act that wholly inverted the hierarchy between *in spiritualibus* and *in temporalibus*, signifying the wholesale collapse of *imperium* into *dominium*.¹⁴⁶ A landmark in the evolution of the omni-insular doctrine¹⁴⁷—a hieratic territorialist ploy derived from the spurious ‘Donation of Constantine’ which conferred upon the Papacy title of all unclaimed islands¹⁴⁸—*Inter caetera* effected an archaic form of feudal investiture on a global scale.¹⁴⁹

The late feudal nature of the bulls is reflected in two critical ways. Firstly, both *Inter caetera* and the Treaty affirm the orthodoxy of *mare clausum*, the possession of coastal or insular territory providing the basis of exclusionary title over adjacent maritime spaces.¹⁵⁰ Formally entitled the ‘Capitulation of the Division of the Ocean-Sea,’ the Treaty of Tordesillas declares

You can leave and do leave to the said Kings and Queens and to their Realms and successors, all the seas, islands and lands, which shall remain to the said King and Queen...

- 145 For the dating and issuance of the bulls, See H. Vander Linden, ‘Alexander VI and the Demarcation of the Maritime and Colonial Domains of *Spain and Portugal*, 1493–1494,’ *American Historical Review*, 32 (1916), 1–20, *passim*.
- 146 J.H. Burns, *Lordship, Kingship, and Empire: The Idea of Monarchy, 1400–1525* (Oxford: Clarendon Press, 1992), 25–32.
- 147 Grewe, *The Epochs of International Law*, 132–3; Luis Weckmann-Munoz, ‘The Alexandrine Bulls of 1493: Pseudo-Asiatic Documents,’ in Fredi Chiapelli (ed.), *First Images of America: The Impact of the New World on the Old*, i (Berkeley: University of California Press, 1976), 201–10, *passim*.
- 148 Grewe, *The Epochs of International Law*, 123–4; Williams, *The American Indian in Western Legal Thought*, 81–93; Weckmann-Munoz, ‘The Alexandrine Bulls of 1493,’ *passim*. The islands claimed by the Papacy under the Donation included Ireland, Corsica, Sardinia, the Balearic Islands, Rhodes, Cyprus, Malta, the Azores and Cape Verde. All papal bulls confirming the omni-insular doctrine follow an established pattern, which ‘included in addition to the grant of islands, although in a perfunctory way and haphazard manner, the donation of seas (*maria*), ports (*porti*), provinces (*provinciae*), or in a generic sense, lands (*terrae*).’ Ibid. 207.
- 149 The Treaty of Tordesillas ‘improved the legal form of the infoedation [process] through the inclusion of technical terms like ‘investimus’ and ‘investiture,’ and by taking account of all of the legal requirements relating to the establishment of the fief, its statute, the assurance of protection, and dispensation from the *laudemium*.’ Grewe, *The Epochs of International Law*, 236.
- 150 J.H.W. Verzijl, *International Law in Historical Perspective. Volume IV: Stateless Domain* (Leyden: A.W. Sijthoff, 1971), 8–21. The more outstanding examples of *mare clausum* in the Late Middle Ages include England and the North Sea, Genoa and the Ligurian Sea, Pisa and the Tyrrhenian Sea, and, most notoriously, Venice and the Adriatic, or ‘the Gulf of Venice.’ Ibid. 11–14.

that all the seas, islands and lands shall be and might be within the limits and demarcation of coasts, seas, islands and lands, which shall remain for us and our successors, shall be ours and for our dominion and conquest, and thus for our Realms and successors.¹⁵¹

Secondly, *plenitudo potestatis* is clearly represented in terms of territorial *dominium* through a discursive linkage with crusading warfare;¹⁵² the legality of both the bulls and the Treaty ultimately rests with the Pope's power *in temporalibus* to dispossess the infidel as a valid exercise of his power *in spiritualibus*.¹⁵³ Both sets of texts are expressly premised upon evangelisation as the critical act of symbolic validation.¹⁵⁴ Consequently, the Habsburg publicist Juan de Solorzano Pereira was able to confidently conclude in his *De Indiarum Iure* (1629–39)

If this work [of converting the New World] is to be enjoined upon and demanded of any Christian ruler, no one can deny that it ought to be committed as by right to the Catholic Kings of Spain [who were the first] to explore and to occupy those lands of the New World that had been unknown to the ancients.¹⁵⁵

- 151 Steinberg, *The Social Construction of the Ocean*, 82. The *Inter caetera* 'are acts of papal sovereignty, in favour of a single power.' Vander Linden, 'Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493–1494', 11.
- 152 James Muldoon, James, 'Papal Responsibility for the Infidel: Another Look at Alexander VI's *Inter Caetera*', *Catholic Historical Review*, 64 (1978), 168–84 at 176; Muldoon, 'Boniface VIII's Forty Years of Experience in the Law', 472–3; Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest*, 13–58 and 67–74.
- 153 Grewe, *The Epochs of International Law*, 119–20; Muldoon, 'Papal Responsibility for the Infidel', *passim*; John W. O'Malley, 'The Discovery of America and Reform Thought in the Early Cinquecento', in Fredi Chiapelli (ed.), *First Images of America: The Impact of the New World on the Old*, I (Berkeley: University of California Press, 1976), 185–200, *passim*. See also James Muldoon, James, 'Extra Ecclesiam non est Imperium: The Canonists and the Legitimacy of Secular Power', *Studia Gratiana*, 9 (1996), 553–80 at 572–9.
- 154 Williams, *The American Indian in Western Legal Thought*, 79:
Spain's action in seeking quick papal confirmation of its rights in the 'Indies' indicates the importance attached to the legitimating function played by the papacy's hierocratic assertions of jurisdiction over infidel peoples in the international colonizing theory and practice of the Iberian Christian states in the early years of the Discovery period.
- 155 James Muldoon, James, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1988), 154. 'Thus, the papal missionary mandate, even if only indirectly, i.e., by way of a just war, is the true legal title to the *conquista*.' Carl Schmitt, 'The Land Appropriation of a New World', *Telos*, 109 (1996), 29–80 at 54.

Virtually every primitive international legal scholar was intransigently opposed to papal monarchy.¹⁵⁶ The Late Scholastic resistance to *in temporalibus* logically equates with a repudiation of papal *imperium* as *dominium/proprietas*, necessitating a discursive shift 'backwards' towards *imperium* as jurisdiction *in spiritualibus*. As we would expect, neo-Thomist anti-hierocracy forms a central rhetorical pillar of *De Indis*. Grotius' account, closely following Vitoria's own *De Indis* (1537-38), succinctly encapsulates the doctrinal ellipsis brought about through the hieratic subversion of metaphysical categories.

I shall not enter here into any dispute as to the power pertaining to the Pope (in other words, the Bishop of the Church of Rome); nor shall I make any assertion save on the basis of a hypothesis accepted by the most erudite of those persons who attribute the highest possible degree of authority to the Papal office, and among whom the Spaniards in particular are included.¹⁵⁷ The latter have boldly asserted (and I use their own words), that the Pope is not the civil or the temporal lord of the whole earth; for, with their characteristic acuteness, they have readily grasped these facts: that Christ the Lord renounced all earthly sovereignty;¹⁵⁸ that in His human form He certainly did not possess

156 In his revisionist account Steinberg argues that both *Inter caetera* and the Treaty, at best, conveyed operational control—'fields of force'—to the Iberians rather than formal *dominium*, an act more consistent with early mercantilism than with late feudalism. Steinberg, *The Social Construction of the Ocean*, 75–89. The critical shortcoming in Steinberg's account is that he utterly fails to situate the Treaty within terms of *in plenitudo potestatis* with its inevitable conflation of papal power *in spiritualibus* with *in temporalibus*. Even if it were to be granted—which it is not—that the instruments were concerned solely with navigational rights within rather than *proprietas* over oceanic space, the legal validity of the Texts is wholly dependent upon the underlying notion of papal *imperium* as lawful *iurisdictio*; otherwise the perceived binding force of the instruments against third parties, such as the Dutch, becomes impossible to explain. The real 'problem' of the Treaty is not Portuguese *dominium* but papal *imperium*, as the Iberians themselves were well aware.

The Spanish had long cited papal grants as a basis for a variety of activities beginning with the *reconquista* itself... in a paradoxical way, the Spanish monarchy justified ascendancy over its empire as a charge delegated by popes claiming authority over secular rulers [*in plenitudo potestatis*]. Thus, from an assertion of papal control over European Christian rulers, [*in temporalibus*], in the hands of lawyers, was transformed into a basis for asserting a European Christian ruler's right to conquer the New World.

Muldoon, 'Boniface VIII's Forty Years of Experience in the Law', 472–3. To cite just one example: in the Treaty of Saragossa of 22 April, 1529, Charles V conveyed to Portugal, 'all right, action, dominion, and possession or quasi-possession and all rights of navigation, traffic, and trade in any manner whatsoever, that... [he] holds... in the said Moluccas, islands, places, lands and seas.' Alfred P. Rubin, 'International Law in the Age of Columbus', *Netherlands International Law Review*, 39 (1992), 5–35 at 15.

157 Francisco de Vitoria, 'On the American Indians', in id., *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 231–92 at 259–61 and 264–5.

158 Ibid. 253–8.

dominium over the entire world; and that if He had possessed such dominium, this sovereign right could not by any series of arguments be attributed to the Pope or transferred on a vicarious basis to the Church of Rome, inasmuch as it is indubitably true in other respects, also, Christ possessed many things to which the Pope did not fall heir.¹⁵⁹ Certain other admissions should also be noted, namely: that even if the Pope had worldly power of this kind, he would still not be right in exercising it, since he ought to be content with his spiritual jurisdiction; that, in any case, he would be in no wise be able to cede such power to secular princes; that, moreover, if he does possess any temporal power, he possesses it... for spiritual ends;¹⁶⁰ and that, consequently, he has no power at all over infidel peoples,¹⁶¹ since they are not members of the Church.¹⁶²

As the Pope axiomatically lacks the requisite secular authority to effect a global conveyance of *proprietas*, such a purported transferral is illegal, laying outside of the domain of positive *ius gentium primum*.¹⁶³

IX *Monarchia Universalis II: Imperium*

The most immediate problem for the profane imperium was the necessarily territorialist logic of imperial formation. Although imperial-like structures in the 20th and 21st centuries may be constituted in non-territorial forms through the institutional and economic inter-linkages of hegemony,¹⁶⁴ in the early modern period the secular concept of 'empire' necessarily implied both territorial conquest and a requisite degree of political centralisation. The 'grand strategy' of the Habsburgs throughout the 'long' 16th century was based on three foundational principle, each reflecting a strictly territorialist logic of power: the maintenance of the territorial integrity of the Habsburg *patrimonium*; the global defence of Catholicism; and the enforcement of the exclusive trade monopolies in both the

159 Ibid. 259–61.

160 Ibid. 262–3.

161 The 'East Indians'.

162 Grotius, *De Indis*, 223.

163 Ibid. 244–5 and 258–60.

164 Johan Galtung, 'A Structural Theory of Imperialism', *Journal of Peace Research*, 8 (1971), 81–117 at 81:

In this way the more generically encompassing concept of 'imperialism' serves to neatly complement the post-territorialist form of contemporary 'informal empire'. Imperialism 'is a sophisticated type of dominance relation which cuts across nations, basing itself on a bridgehead which the [political] centre in the Centre nation establishes in the [political] centre of the Periphery nation, for the joint benefit of both [political centres]... [Therefore] imperialism is a system that splits up collectivities and relates some of the parts to each other in relations of *harmony of interest*, and other parts in relation of *disharmony of interest*, or *conflict of interest*.

East Indies and the West Indies.¹⁶⁵ Central to the formation of empire, whether of the formal or informal type, is the precise nature of the political, economic, and military relationship between the core-zone and the peripheries. To qualify as an 'empire', the polity in question must formally establish a hierarchical series of relationships between and among its separate components; 'Empire... is a system of interaction, between two political entities, one of which, the dominant metropole, exerts political control over the internal and external policy—the effective sovereignty—of the other, the subordinate periphery.'¹⁶⁶ Conversely, the formalisation of core/periphery relationships in explicitly hierarchical terms is the primary sign of the presence of an imperial construction. For Motyl, empire is a 'hierarchically organized political system with a hub-like structure—a rimless wheel'¹⁶⁷—within which a core elite and state dominate peripheral elites and societies by serving as intermediaries for their significant interactions and by channelling resource flows from the periphery to the core and back to the periphery.¹⁶⁸ From this flows the wider problem of what, if anything constitutes the requisite degree and necessary form of political centralisation and territorial integration necessary to signify a uniquely imperial form of polity. Motyl distinguishes between 'continuous' empires which are 'tightly massed and, in all likelihood, territorially contiguous', and 'discontinuous' empires, that are 'loosely arranged and often involve overseas territories'.¹⁶⁹ With the rise of the Capitalist World-Economy in the 'long' 16th century and the beginnings of the integration of foreign world systems into the nascent European core-zone, *la longue duree* of the Modern World-System has shown a marked preference for the later form. However, this fact points to another consideration of wider importance. Although hierarchical and territorial, the Roman imperium was, by the end of its existence, able to constitutionally unify the totality of its domains into a single polity; through the universalisation of Roman citizenship, the empire legally became a unitary municipality.¹⁷⁰ Yet, the history of European imperialism is marked by the recurrent inability to re-constitute the peripheral regions as part of the metropole in order to form a constitutionally unified albeit non-contiguous State. The explanation lies within the structural logic of the Capitalist World-Economy; European imperialism is foundationally inseparable from the process of Colonialism. The direct integration of the periphery into the core-zone through legal and political unification, resulting in non-hierarchical constitutional equality, would undermine in its entirety the operation of those economically necessary sub-divisions of labour and exploita-

165 Paul C. Allen, *Philip III and the Pax Hispanica 1598–1621: The Failure of the Grand Strategy* (New Haven: Yale University Press, 2000), 239.

166 Michael J. Doyle, *Empires* (Ithaca: Cornell University Press, 1986), 12.

167 'Core-periphery relations in an empire resemble an incomplete wheel, with a hub and spokes but no rim.' Alexander J. Motyl, *Imperial Ends: The Decay, Collapse, and Revival of Empires* (New York: Columbia University Press, 2001), 16.

168 Ibid. 4.

169 Ibid.

170 Thomas, *Textbook of Roman Law*, 30.

tion that served as the actual preconditions for imperial formation. As the core, semi-periphery, and periphery zones perform precise and discrete economic 'functions' within the Capitalist World-Economy, they must be kept politically and constitutionally separate. Although this argument is well beyond the scope of this study, it does appear plausible to suppose that the inability or unwillingness to juro-politically unify the metropole with the periphery is itself a primary sign of the inherently Capitalist nature of the inter-state system that is under historical consideration. Accordingly, an unresolved contradiction within the political logic of the Habsburg *imperium* was that it attempted to reconcile the theory and practice of 'discontinuous' empire outside of the lines of amity—the Spanish seaborne empire—with the continuous empire located at the geo-strategic centre of the core-zone, the land-based polities of Iberia and Germany, the 'Holy Roman Empire'. As the two entities were dynastically co-joined, the political logic of the dominant but unwieldy centre—the territorialism of the land-based continuous empire—dominated throughout.¹⁷¹

The fundamental paradox of the Habsburg *imperium* was that it attempted to establish itself as a world-empire concurrent with the emergence of the heterogeneous Capitalist World-Economy.¹⁷² The two forms of global inter-state formation are inherently incompatible; 'A world-empire is a socio-economic system in which the division of labour is incorporated within a single overarching state apparatus. A world-economy is an economic division of labour which is overlaid by a multicentric system of states.'¹⁷³ The instability of the material base of any such purported global territorialist entity was paralleled by the inherent contradictions of Iberian discursive formation, the Habsburg publicists unsuccessfully negotiating the dual heritage of contending ontologies. One stream of Iberian discourse was derived from the 'thick' millenarian ideology of the medieval Hohenstaufen *sacrum imperium*,¹⁷⁴ a rhetorical complex taken up with élan by the 'successor'

171 J.A. Fernandez-Santamaria, *The State, War and Peace: Spanish Political Thought in the Renaissance 1516–1559* (Cambridge: Cambridge University Press, 1995), 171.

172 Ibid. The Habsburg dynasty 'sought to create a world-empire, not a core state within a world economy.' Wallerstein, *The Modern World-System I*, 335. 'The politics of [the long 16th century revolved] around the attempts by Spain... to transform the European world economy into a world-empire.' Ibid. 265.

173 Christopher Chase-Dunn, 'Interstate System and Capitalist World-Economy: One Logic or Two?', in W. Ladd Hollist and James N. Rosenau (eds), *World System Structure: Continuity and Change* (London: Sage Publications, 1993), 30–53 at 36.

174 John M. Headley, 'The Habsburg World Empire and the Revival of Ghibellinism', in David Armitage (ed.), *Theories of Empire 1450–1800* (Aldershot: Variorum, 1998), 45–79, *passim*; Muldoon, *Empire and Order*, 87–138; Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (New Haven: Yale University Press, 1995), 24–7, 41 and 49. 'By the end of the sixteenth century, by which time the empire itself had shrunk to its earlier Germanic limits, *monarchia universalis*... had, in effect, come to replace *imperium* as a term for the continuing aspiration to supra-national authority.' Ibid. 43.

world-emperor Charles V.¹⁷⁵ Ultimately, however, the ‘realist’ version of Habsburg imperium was thwarted by internal political and discursive resistance. On the material plane, the perception of the ‘national’ monarch as *imperator* led to a series of costly revolts within the regional principalities, led primarily by Castile.¹⁷⁶ On the discursive plane, Castilian ‘national’ resistance fuelled the resurgence of neo-Thomist scholarship emanating from the School of Salamanca;¹⁷⁷ as they had done against *plenitudo potestatis*, the Spanish primitive legal scholars (Vitoria, Suarez, de Soto) employed Natural Law theory as a means of subverting the absolutist and centralizing ideology of the Iberian *monarchia universalis*.¹⁷⁸

The alternative discursive stream flowed from the ‘thin’ ontology of Aristotelian Humanism, the Universalism of *civitas* providing the necessary ideological legitimization of the Hispanic world-state, *cosmopolis*.¹⁷⁹ The fatal rhetorical flaw of

175 ‘The union of the Spanish Monarchy and the Holy Roman Empire in the person of Charles V... raised the spectre of a Habsburg universal monarchy in Europe, fuelled by the bullion of the Indies and the trade in Seville.’ David Armitage, ‘Introduction’, in id. (ed.), *Theories of Empire 1450–1800* (Aldershot: Variorum, 1998), xv–xxxiii at xix. See Frances A. Yates, *Astraea: The Imperial Theme in the Sixteenth Century* (Boston: Routledge & Kegan Paul, 1975), 1–28; Anthony Pagden, *Spanish Imperialism and the Political Imagination: Studies in European and Spanish-American Social and Political Theory 1513–1830* (New Haven: Yale University Press, 1998), 37–64; Franz Bosbach, ‘The European Debate on Universal Monarchy’, in David Armitage (ed.), *Theories of Empire 1450–1800* (Aldershot: Variorum, 1998), 81–98, *passim*. The effort was continued by Charles’ Spanish successor Philip II in his capacity as ‘Emperor of the New World’. Muldoon, *Empire and Order*, 118–20.

176 Fernandez-Santamaria, *The State, War and Peace*, 1. See Pagden, *Lords of All the World*, 40:

Castile strive[d] to play three political parts at times drastically incompatible with each other: a modern state in its early evolutionary stages forced by the vagaries of dynastic arrangements into a framework of the medieval imperial idea, while simultaneously becoming the nucleus of a rapidly growing and new form of empire.

177 Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 1 fn. 1:

The School of Salamanca is frequently used inter-changeably with ‘second’ or ‘Late’ Scholasticism. The terms ‘School of Salamanca’ and ‘second scholastic’ usually apply to the entire legal period of sixteenth-century Spanish scholasticism, from Vitoria to Suarez. They therefore span both the early Dominican period and the later, Jesuit-dominated stage, when the movement ceased to be centred on the University of Salamanca.

178 Bernice Hamilton, *Political Thought in Sixteenth Century Spain* (Oxford: Clarendon Press, 1963), 59–68; Pagden, *Lords of All the World*, 47 and 49. Castile was the centre of Spanish Republicanism; see Xavier Gill, ‘Republican Politics in Early Modern Spain: The Castilian and Catalano-Aragonese Traditions’, in Martin van Gelderen and Quentin Skinner (eds), *Republicanism and Constitutionalism in Early Modern Europe* (vol i of *Republicanism: A Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 263–88, *passim*.

179 Pagden, *Lords of All the World*, 19–23.

Spanish Humanism replicated the ideological tensions engendered through the de facto convergence between Empire and Papacy signified by *Inter caetera* and the Treaty of Tordesillas. Ultimately, it proved impossible to globally legitimate an Iberian world-state in any terms other than the comparatively 'thick' ontology of Catholic proselytism.¹⁸⁰ Even a comparatively 'secular' publicist such as Juan Garies de Sepulveda¹⁸¹ found inescapable the strict logical correlation between evangelisation and territorialism; the symbolically verifying act of forcible conversion could be expressed in no other way than through the ultimately de-legitimizing Just War¹⁸² of imperialist expansion.

What I affirm and have written is, in sum, that the conquest of the Indies—to subdue those barbarians, extirpate their idolatry, force them to observe natural law¹⁸³ even against their will, and after subjecting them to preach the Gospel to them with Christian meekness and without force—is both just and holy... It is beneficial for the barbarians to be subjected to the *imperium* of nations or princes more humane and virtuous [than their own], the object being that through the latter's example of virtue and prudence the former embrace a more humane mode of life.¹⁸⁴

Iberian *civitas*, therefore, ultimately proved as alienating to Spain's interstate rivals within the emergent core zone as *Inter caetera*. The earliest articulations of the balance of power theory as operating on the truly international plane were, in fact, directed against the Hispanic world-empire. Appropriately, it was Alberico Gentili, the sole Italian Humanist among the primitive legal scholars, who provided the classic formulation.

It was the constant care of Lorenzo de' Medici, that wise man, friend of peace, and father of peace, namely that the balance of power should be maintained among the princes of Italy. This he believed would give peace to Italy, as indeed it did so long as he lived and preserved that condition of affairs. But both the peace and the balance of power ended with him... Is this not even today our problem, that one man may not have

180 'The persistent reliance in circles close to the Castilian court on the papal donation, and its continuing importance in the official historiography of the Spanish empire, served to keep the continuity between the Spanish monarchy and the ancient and subsequent *Imperium romanum* firmly on the agenda.' Pagden, *Lords of All the World*, 32. Presumably, this was one reason why Toledo was so insistent upon utilizing *Inter caetera* in establishing its title to the New World; under the terms of the Bull, the Spanish monarchy was invested with all ecclesiastical prerogatives. Lewis Hanke, 'Pope Paul III and the American Indians,' *Harvard Theological Review*, 30 (1939), 65–102, *passim*.

181 Fernandez-Santamaria, *The State, War and Peace*, 163–236.

182 See below, Chapter Six.

183 Here, Aristotelian *habitus* rather than Thomistic *lex aeterna*.

184 Cited in *ibid.* 168 and 223.

supreme power and that all Europe may not submit to the domination of a single man? Unless there is something which can resist Spain, Europe will surely fall.¹⁸⁵

The dissemination of balance of power theory throughout the core zone signified ideological 'defeat of an attempt to recreate political empires that would match economic areas.'¹⁸⁶ The monist unification of the heterogenous European world economy ultimately proved incompatible with the dynamics of the emergent Capitalist World-Economy.¹⁸⁷ Anti-Iberian efforts, therefore, were deliberately extended throughout the parameters of the World-Economy, identified as the material base of an Hispanic-centric regime of global governance.

The assumption on which the closed system of a European balance of power rested—that the State system, which was still in *statu nascendi*, was to be confined to Europe and not to be complicated by the incalculable factors of the overseas world—was too artificial to resist, in the long term, the drive to expansion on the part of a new generation of States. Along with the decline of Spanish power¹⁸⁸ came the collapse of the last barriers which Spain had erected, through the *modus vivendi* arrangement of the 'lines of amity' [i.e., the Treaty of Tordesillas] and the principle of 'no peace beyond the line,' which had sought to block the advance of the other European powers into the new oceans and continents.¹⁸⁹

By either discursive formation, Scholastic or Humanist, Iberia was never able to neutralize the de-legitimizing effects of territorialism, which ultimately subvert-

185 Alberico Gentili, *De Iure Belli Libri Tres*, with Introduction by Coleman Philipson (New York: Ocean Publishers, 1964), 65.

The only alternative to armed conflict was tame submission to Hapsburg domination. The series of wars ending with the peace of the Pyrenes (1659) solved the outstanding problem of Europe: the final overthrow of the Hapsburg hegemony established the principle of balance of power, which henceforth would militate against every attempt to set up a single-state rule over Europe.

S.H. Steinberg, 'The Not So Destructive, Not So Religious, and Not Primarily German War,' in Theodore K. Rabb (ed.), *The Thirty Year's War: Problems of Motive, Extent and Effect* (Boston: D.C. Heath, 1964), 25–31 at 26. For a discussion of balance of power as an extension of the political system of the Italian city-states exported to the whole of the European world system signifying the emergence of the concept of 'national sovereignty,' see Randall Lesaffer, 'The Grotian Tradition Revisted: Change and Continuity in the History of International Law,' *The British Yearbook of International Law*, 73 (2002), 103–39 at 110–15. Lesaffer points out that in the mid sixteenth century the concept of *amicitia*, generally enforceable 'promises of peace,' began to supplant traditional references to universal monarchy in treaty law. Ibid. 120–1.

186 Wallerstein, *The Modern World System I*, 184.

187 'From the sixteenth century onwards, the nation-states of Europe sought to create relatively homogenous national societies at the core of empires.' Ibid. 20.

188 See *ibid.* 165–97, *passim*.

189 Grewe, *The Epochs of International Law*, 157–8.

ed the attempt of Portugal/Spain to establish itself as a 'true' hegemon; 'the failure of Charles V was the success of Europe.'¹⁹⁰ Conversely, the failed hegemonic status of Iberia provided the basis for the successful hegemonic transition of an interstitial state such as the United Provinces. Central to this process was Holland's ability to successfully act as the nexus for the coeval emergence of Capitalism and balance of power doctrine, the parallel forms of the economic and political logic of the Modern World-System.

The wealth and power of Holland... were based on commercial and financial networks which the Dutch capitalist oligarchy had carved out of the seaborne and colonial empires through which the territorialist rulers of Portugal and Spain, in alliance with the Genoese capitalist oligarchy, had superseded the wealth and power of Venice... As a consequence of its eighty-year-long war of independence against Imperial Spain, the Dutch became champion and organizer of the proto-nationalist aspirations of dynastic rulers. At the same time, they continuously sought ways to and means to prevent conflict from escalating beyond the point where the commercial and financial foundations of their wealth and power would be seriously undermined. In pursuing its own interest, the Dutch capitalist oligarchy thus came to be perceived as the champion not just of independence from the central authorities of the medieval system of rule but also of a general interest in peace which the latter were no longer able to serve.¹⁹¹

The true historical significance of the 'Grotian' Peace of Westphalia, then, is that it served as the legitimation of the principle of the balance of power within the core zone (or, in the alternative, the lines of amity) in a manner strictly commensurate with the rise and development of the Capitalist World-Economy.¹⁹² Once again, the linkage with Capitalism proves vital; 'The balance of power was thus always integral to the development of capitalism as a mode of rule.'¹⁹³ In the final

190 Wallerstein, *The Modern World System I*, 38.

191 Arrighi, *The Long Twentieth Century*, 45.

192 The material provisions of the Westphalian Settlement marked the substantive defeat of the 'grand Strategy' of the Habsburgs: the Protestant 'friendly' guarantee of *cuius regio cuius religio*; the recognition of the territorial objectives of France and Sweden, and, most importantly, *de jure* recognition of the national sovereignty of the United Provinces. Stephane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Martinus Nijhoff Publishers, 2004), 87.

193 Arrighi, *The Long Twentieth Century*, 39:

In fact, the balance of power can be interpreted as a mechanism by means of which capitalist states can, separately or jointly, reduce protection costs both absolutely and relative to their competition and rivals. For the balance of power to become such a mechanism, however, the capitalist state(s) must be in a position to manipulate the balance to its (their) advantage instead of being cog(s) in a mechanism which no one can or someone else controls. If the balance of power can be maintained only through repeated and costly wars, then participation in its working defeats the purpose of the capitalist state(s) because the pecuniary costs of such wars inevitably tend to exceed

instance, it was the Dutch commitment to both the Freedom of the High Seas and to Freedom of Trade provided the discursive strategy necessary to ideologically counter Spanish-Catholic *Herrschaft* with Dutch-Protestant *Einfluss*.

X *Estado da India Oriental*

The dual legacy of the pre-capitalist nature of the Portuguese economy,¹⁹⁴ coupled with the discursive formation of *monarchia universalis* pre-determined Iberia's status as a 'failed' hegemon¹⁹⁵ by committing the kingdom to an unsustainable policy of Absolutist territorialism. Although a pioneer of the political form of the 'seaborne empire',¹⁹⁶ Portugal's near-exclusive reliance upon *Inter caetera* as the 'legitimizing settlement' of its transient hegemony discursively pre-empted Iberia from successfully negotiating the sine non qua requirements of material and ideological leadership; in a broadest sense, the juridical significance of the Treaty of Tordesillas 'lies in having created a regime for the governance of global-level interactions, the world's first global political regime'.¹⁹⁷ The act of Papal Donation, in turn, was inseparable from the marginalisation of the Mediterranean-centred European world economy, signified by the Iberian 'conquest' of Italy.

The year 1494... marks the creation of the Modern World System for two reasons. First, it opens the Italian Wars that soon spread to the Indian Ocean, hence the first global war of the modern era. In turn, this global war may be counted as the first phase of the first systemic long cycle. Second, the year also marks the formal inauguration of the first differentiated regime for oceanic management, one that was reaffirmed by the outcome of the global war and that came to govern oceanic communications until 1609, having come under serious challenge only in the last quarter of the sixteenth century [i.e., the Dutch Revolt].¹⁹⁸

their pecuniary benefits. The secret of capitalist success is to have one's wars fought by others, if feasible costlessly and, if not, at the least possible cost.

194 Ibid. 38–42, 47–52 and 325–44.

195 Modelski and Thompson, *Seapower in Global Politics, 1494–1993*, 151–85.

196 'Portuguese India did not designate a space that was geographically well defined but a complex of territories, establishments, goods, persons and administrative interests in Asia and East Africa generated by or subordinate to the Portuguese Crown, all of which were linked together as a maritime network.' Sanjay Subrahmanyam and Luis Felipe F.R. Thomaz, 'The Evolution of Empire: The Portuguese in the Indian Ocean During the Sixteenth Century', in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 298–331 at 304. See also Luis Felipe F.R. Thomaz, 'The Portuguese in the Seas of the Archipelago during the Sixteenth Century', in Om Prakash (ed.), *European Commercial Expansion in Early Modern Asia* (London: Variorum, 1997), 25–41, *passim*; Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (New York: Verso, 1994), 91–121.

197 Modelski, *Long Cycles in World Politics*, 69.

198 Ibid.

Employing the logic of territorialism, Iberia was able to forcibly incorporate the Mediterranean trade routes into a national network, virtually undercutting the fiscal source of the political autonomy of the most important Communes, Genoa and Venice.¹⁹⁹

The first instance of global-scale warfare had far-reaching consequences: it ended Italy's role as the centre of the European regional system and at the same time terminated Venice's part in organizing that system; furthermore, by engaging Europe's major states in a regional conflict in Italy it freed Portugal for oceanic action to establish a global system sanctioned by the Treaty of Tordesillas and superseding the Venetian one.²⁰⁰

The fatal structural flaw of *Estado da India Oriental* proved to be, in fact, the unbridled exportation of late medieval eurocentric territorialism into juridically alien space; the first territorialist hegemon ultimately failed to successfully establish itself precisely because it was both ideologically and materially unable to effect a self-sustaining capitalistic penetration of the Indian Ocean world system. Rather than supervising an inherently commercial enterprise, the *fidalgos* understood oceanic management in terms of crusading warfare; 'for the Portuguese, peaceful trade alongside Muslims on a basis of equality was impossible, for the crusade element was inherent in their presence in the Indian Ocean.'²⁰¹ Following a pattern of conquest and proselytism established by the 'foundational figure' Prince Henry the Navigator, the Portuguese symbolically validated the peripheralisation of indigenous communities and polities through the discourse of evangelization.²⁰² The late feudal ideology of territorialist crusading warfare fuelled a vicious circle of self-defeat: 'the Portuguese immediately realised that they could

199 Arrighi, 'The Three Hegemonies of Historical Capitalism', 377.

200 Modelski, *Long Cycles in World Politics*, 73.

201 M.N. Pearson, 'Merchants and States', in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 41–116 at 54 and 30–56. See John H. Elliott, 'The Seizure of Overseas Territories by the European Powers', in David Armitage (ed.), *Theories of Empire 1450–1800* (Aldershot: Variorum, 1998), 139–57, *passim*.

202 Luis Felipe F.R. Thomas, 'Factions, Interests and Messianism: The Politics of Portuguese Expansion in the East, 1500–1521', *Indian Economic and Social History Review*, 28/1 (1991), 97–109, *passim*; Pauline Moffitt Watts, 'Apocalypse Then: Christopher Columbus's Conception of History and Prophecy', *Medievalia et Humanistica*, 19 (1992), 1–10, *passim*.

The claim to free access to the East Indies for spreading the Christian faith... must be understood against the background of the primary objective of the Portuguese, to undercut the vital supply lines of Islam in the East and to weaken the military potential of the Ottoman Empire threatening the centres of Christian Europe.

C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967), 50–1.

only break [the politically unacceptable Muslim domination of the Indian Ocean sub-system] by brute force and not by peaceful cooperation.’²⁰³

Both crusading and evangelisation perfectly complemented the territorialist logic of the early Absolutist State;²⁰⁴ *Estado da India* was established upon essentially late medieval principles.²⁰⁵ Both the tributary *cartaza* system of maritime licenses and tolls²⁰⁶ and the juridically prescribed practice of *qufila* (convoy

- 203 C.H. Boxer, *The Portuguese Seaborne Empire 1415–1825* (Harmondsworth: Penguin Books, 1969), 46. Appropriately enough, ‘as soon as the Portuguese arrived on the scene Islam took up arms against the intruder.’ M.A.P. Meilink-Roelofs, *Asian Trade and European Influence in the Indonesian Archipelago Between 1500 and About 1630* (The Hague: Martinus Nijhoff, 1962), 118.

The leading *fidalgos* were all motivated by an economic ideology that did not see long-distance trade as contemporary merchants would have seen it but rather as a legitimate medium for extracting political tribute through military means. It is certainly true that the aggressive attitude adopted by the Portuguese and their Islamic adversaries in the Indian Ocean was a fixation that did not take into account that co-existence or even peaceful trading might be more profitable than waging perpetual war by land and sea.

K.N. Chaudhuri, *Trade and Civilization in the Indian Ocean: An Economic History from the Rise of Islam to 1750* (Cambridge: Cambridge University Press, 1985), 69.

- 204 John Villiers, ‘The Estado da India in Southeast Asia: Administration, Law and International Relations’, in A.J.B. Russell-Wood (ed.) *Government and Governance of European Empires, 1450–1800* (Aldershot: Variorum, 2001), 17–50, *passim*; Anthony Disney, ‘The Portuguese Empire in India, c. 1550–1650’, in John Correia-Afonso (ed.), *Indo-Portuguese History: Sources and Problems* (Oxford: Oxford University Press, 1981), 148–62, *passim*; Subrahmanyam and Thomaz, ‘The Evolution of Empire: The Portuguese in the Indian Ocean During the Sixteenth Century’, *passim*. To cite just one example: the widespread ‘administrative’ office of *capitania* appears to have constituted a form of infeudation. Charles Verlinden, *The Beginnings of Modern Colonization: Eleven Essays with an Introduction* (Ithaca: Cornell University Press, 1970), 203–46.

- 205 J.C. van Leur, *Indonesian Trade and Society: Essays in Asian Social and Economic History*, (The Hague: W. van Hoeve, 1955), 170:

Portuguese power was typically medieval in character, a fact that helps to explain its limited effectiveness. There was not much unity to the scattered territory of port settlements spread out over thousands of miles, despite the centralized royal shipping from Goa to Europe. There was no hierarchy of officials with a distinction between civil and military administration, but a conglomeration of nobles and *condottieri* each with his own retinue of henchmen bound to him by vassal’s loyalty or a lust for gain; often the officials in authority provided their own equipment and carried out exploitation for their own benefit by means of offices bestowed on them, frequently on a short-term basis. Portuguese power sought its strength then, not in taking over Oriental [sic] trade or establishing a territorial authority [i.e., in the form of ‘rational’ administration], but in acquiring tribute and booty. Non-economic motives—lust for plunder, not lust for profit—played the chief role in overseas expansion.

- 206 Villiers, ‘The Estado da India in Southeast Asia’, 22–3.

transport)²⁰⁷ flowed from the quintessential feudal institution of *mare clausum*; throughout the Indian Ocean economy the Portuguese ruthlessly superimposed closed seas upon the indigenous system of *mare liberum*.²⁰⁸ The coupling of quasi-feudal property regimes with primitive capitalist modes of surplus extraction has led Steensgaard to classify the Portuguese seaborne empire as a forcible 're-distributive enterprise'. The *Estado da India* was 'a dynamic system but the innovations were kept within the pattern of redistribution and the profit was consumed in a seigneurial way of life or reinvested in re-distributive enterprises, not in productive or productivity-increasing enterprises. The Portuguese were tax-gatherers and the *Estado da India* was a re-distributive institution.'²⁰⁹ To regulate its de facto non-internalised 'protection racket' the Portuguese were forced to base their territorialist administration upon a cost-prohibitive fortress system, *fortalez-feitoria*,²¹⁰ leading to a non-sustainable dependency upon land-generated taxation,²¹¹ which ultimately precluded the *fidalgos* from commercially exploiting the ultra-lucrative inter-Asian 'country' trade.²¹² This self-destructive tendency towards unprofitability was well expressed as early as 1626 by the Portuguese master-merchant Duarte Gomes Solis:

207 Om Prakash, *European Commercial Expansion in Early Modern Asia* (London: Variorum, 1997), 64–5.

208 Genevieve Bouchon, 'Trade in the Indian Ocean at the Dawn of the Sixteenth Century', in Sushil Chaudhury and Michel Morineau (eds), *Merchants, Companies and Trade: Europe and Asia in the Early Modern Era* (Cambridge: Cambridge University Press, 1999), 42–51, *passim*; Genevieve Bouchon and Denys Lombard, 'The Indian Ocean in the Fifteenth Century', in Ashin Das Gupta and M.N. Pearson (eds), *India and the Indian Ocean 1500–1800* (Calcutta: Oxford University Press, 1987), 46–70, *passim*. 'The whole of the maritime area of the Estado da India was declared to be *mare clausum* by right of *quasi possessio* by the Portuguese crown. This provided the sole legal justification for the cartaza system, whereby every Asian trading vessel had to purchase a pass or *cartaz* from the Portuguese authorities, in return for which it qualified for Portuguese protection.' Villiers, 'The Estado da India in Southeast Asia', 22.

209 Steensgaard, *Carracks, Caravans and Companies*, 86.

210 Villiers, 'The Estado da India in Southeast Asia', 24–50. See below, Chapter Seven.

211 Disney, 'The Portuguese Empire in India, c. 1550–1650', 151:

Overall at least 31% of crown revenues [in the 1630s] would appear to have come from land sources... as opposed to 47% from seaborne commercial activities. Clearly land revenues were of great importance. They were also tending to become more so, for whereas customs returns were 'very variable and uncertain', land derived revenue offered much greater stability.

212 Prakash, *European Commercial Expansion in Early Modern Asia*, 49–63. 'The official perception of Portuguese influence in the East became closer to the idea of empire, and put the emphasis on the sovereign role of the state to the neglect of its commercial activities.' Thomaz, 'The Portuguese in the Seas of the Archipelago during the Sixteenth Century', 77.

It was the advice of our first conquerors,²¹³ that the more fortresses we had [in Africa and India], the weaker we should be, and that to make ourselves master of all India, it would be more safe to bring large fleets here in order to enrich ourselves by trade. But the Portuguese thought more highly of soldiering than of knowing something about trade and such other matters, which with industry might have brought them riches.²¹⁴

The *Estado*, then, represented an extremely early form of 'state capitalism'²¹⁵ with Portuguese trading companies—the *contractadores*—little more than crown corporations centrally administered, usually poorly, by the *Casa da India* based in Lisbon.²¹⁶ What little entrepreneurial innovation there was came exclusively from either foreign bankers or merchant houses—ordinarily Italian²¹⁷—or from private traders (the *chatins*) operating semi-licitly within the Indian Ocean itself.²¹⁸

XI Territorialism and the 'Failed' Hegemon

Portugal thus dismally failed the second major test of the 'true' hegemon, effective leadership in managing a Capitalist World-Economy; the inter-Asian trade of the Portuguese lacked 'the capitalistic structure which was a distinguishing

213 A reference to Dom Francisco de Almeida, first viceroy of the *Estado*, who wrote to Juan II in 1508: 'As for the fortresses which you have ordered to be established in Malacca, the more fortresses you have, the weaker your power will become, *for all your power lies in the sea* and, if we are not powerful there, your fortresses will easily be lost.' Villiers, 'The Estado da India in Southeast Asia,' 48. Emphasis added. Clearly, a sixteenth-century understanding of the Indian Ocean as a 'field of force'.

214 Steengaard, *Carracks, Caravans and Companies*, 254.

215 Bailey W. Diffie and George D. Winius, *Foundations of the Portuguese Empire 1415–1580* (Minneapolis: University of Minnesota, 1979), 301–37. See E.L.J. Coornaert, 'European Economic Institutions and the New World: the Chartered Companies,' in E.E. Rich and C.H. Wilson (eds), *The Economy of an Expanding Europe in the 16th and 17th Centuries* (vol. iv of *The Cambridge Economic History of Europe*) (Cambridge: Cambridge University Press, 1967), 229–40.

216 George D. Winius, 'Two Lusitanian Variations on a Dutch Theme: Portuguese Companies in Times of Crisis, 1628–1662,' in Leonard Blussé and Femme S. Gaastra (eds), *Companies and Trade* (Leiden: Leiden University Press, 1981), 119–34, *passim*.

217 Charles Verlinden, *The Beginnings of Modern Colonization*, 98–112; Steensgaard, *Carracks, Caravans and Companies*, 98–103; Subrahmanyam and Thomaz, 'The Evolution of Empire: The Portuguese in the Indian Ocean During the Sixteenth Century,' 309–11.

218 Ibid. 309; Prakash, *European Commercial Expansion in Early Modern Asia*, 37–9; Om Prakash, 'The Portuguese and the Dutch in Asian Maritime Trade: A Comparative Analysis,' in Sushil Chaudhury and Michel Morineau (eds), *Merchants, Companies and Trade: Europe and Asia in the Early Modern Era* (Cambridge: Cambridge University Press, 1999), 175–88, *passim*. By 1600, private operations involving the 'country' trade were significantly more profitable than the crown monopoly, based upon the long-distance Euro-Asian traffic. Ibid. 177.

feature of the trade of the northern Europeans.²¹⁹ For van Leur, the *Estado* utterly failed to 'introduce a single new element into the commerce of southern Asia.'

The commercial and economic forms of the Portuguese colonial empire were the same as those of the Asian trade and Asian authority; a trade relatively small in volume conducted by the government as a private [crown] enterprise and all further exercise of authority existing only to ensure the financial, fiscal exploitation of trade, shipping and port traffic, with the higher officials and religious dignitaries recruited from the Portuguese aristocracy.²²⁰

As Steensgaard has demonstrated, it is precisely within 'the question of sovereign rights on the open sea that the pre-capitalist nature of the Portuguese Empire is most clearly reflected, and where the discontinuity in relation to the North-West European Companies is most marked.'²²¹ The hegemonic transition from Iberia to the United Provinces reflects not merely conventional inter-state rivalry but the fundamental incommensurability of antithetical modes of oceanic governance.²²² The Grotian Heritage signifies not merely the global supersession of *mare clausum* by *mare liberum*, but the successful establishment of a corporate paradigm of global governance, the correlative juridical expression of an emergent Capitalist World-Economy.

Not until the arrival of [the joint-stock companies] does an institutional innovation take place [in the early global economy]. Simplifying greatly, one might say that here the relationship between 'profit' and 'power' is reversed. *Estado da India* was a re-distributive enterprise which traded in order [to obtain for itself] the full benefit of its use of violence, whereas the Companies were associations of merchants which themselves used violence and thereby internalised the protection costs.²²³ That the factors were not interchangeable was manifested in the Companies' relation to the market; in their flexible planning they turned out, in contrast to the re-distributive enterprises, to be sensitive to the movements of the market at the same time as they sought to control the market by virtue of their quasi-monopolistic position.²²⁴

219 Meilink-Roelofs, *Asian Trade and European Influence in the Indonesian Archipelago*, 179.

220 Van Leur, *Indonesian Trade and Society*, 118. The *Estado* was 'built upon war, coercion and violence, [and] did not at any point signify a stage of 'higher development' economically for the Asian trade.' Ibid.

221 Steensgaard, *Carracks, Caravans and Companies*, 86.

222 Chaudhuri, *Trade and Civilization in the Indian Ocean*, 63–97; M.N. Pearson, *The New Cambridge History of India: The Portuguese in India* (Cambridge: Cambridge University Press, 1987), 61–80. In other words, Iberian T-M-T versus Dutch M-T-M.

223 See below, Chapter Seven.

224 Steensgaard, *Carracks, Caravans and Companies*, 114.

XII 'Events are Dust': *Estado da India* and *L'histoire Structurale*

The mercantile trading companies of the Dutch systemic cycle of accumulation have to be understood as interstitial institutions that precipitated the transformation of the European (sub-) world system into the core-zone of an early Modern World-System organised exclusively along the lines of the capitalist logic of power.²²⁵ While on the micro-level there were clear similarities, if not exact parallels, between the actions of the Dutch traders and their Iberian counterparts,²²⁶ the truly historically significant level of analysis is the macro-; only on this plane is it possible to obtain an accurate understanding of Holland's 'free trade' penetration of the Portuguese territorialist *Estado* as a distinct conjunctural event within *la longue duree*. The critical fact is that throughout the 17th and for much of the 18th century the world's entrepot was Amsterdam, not Lisbon or Seville, Holland's dominance of global trade paralleled by an equivalent dominance within cosmopolitan finance capitalism.²²⁷ By the time that Amsterdam finally gave way to London (c. 1780), completing the (relatively) peaceful and (reasonably) well-coordinated hegemonic transition, Iberia was in an advanced stage of both absolute and relative decline within the now fully globalised Capitalist World-Economy. Holland was securely ensconced within the core-zone while Iberia was effectively relegated to the semi-periphery of southern Europe and the Mediterranean. In Arrighi's own language

Once again, *and on a grander scale* [than that of the earlier Italian city-state system] one capitalist class had successfully promoted and financed, monitored and profited from, and, in the fullness of time, withdrawn from a commercial expansion that encompassed a multiplicity of power and trade networks. Capitalism as a world system was here to stay. From now on, territorialism could succeed in its objectives only by 'internalising' capitalist techniques of power. This... was to be the central feature of the third (British) systemic cycle of accumulation.²²⁸

My argument is that the World-System displacement of the territorialist logic of the *Estado* by the capitalist logic of the United Provinces, accomplished through the historical agency of the VOC, can and should be broken down into three separately constituent temporal waves: *evenementielle*, *conjuncturelle* and *structurale*. The 'events' are the actions of individual agents, such as the disparate Dutch and Portuguese traders themselves; the 'conjuncture' was the irreversible penetration and resultant peripheralisation of the Indian Ocean world system; and the 'structure' was the establishment of the Modern World-System on the

225 Arrighi, *The Long Twentieth Century*, 85–96.

226 For the entrepreneurial activities of the self-made 'adventurers' of the *Estado*, see Sanjay Subrahmanyam, *Improvising Empire: Portuguese Trade and Settlement in the Bay of Bengal 1500–1700* (Delhi: Oxford University Press, 1990), 137–57.

227 Braudel, *The Perspective of the World*, 246–7.

228 Arrighi, *The Long Twentieth Century*, 144.

foundational basis of the capitalist logic of power. As TimeSpace constitutes a single phenomenon²²⁹ these complex sets of temporal waves must be understood as corresponding to the geo-spatial contours of the system. In this light, the Indian Ocean world system appears as a more complex and ambiguous construct, displaying elements of both the 'free seas' in the western zones centred upon the Arabian Sea and the 'closed seas' of the eastern zones centred upon the Straits of Malaccas. Each of these heterogenous zones corresponded in an analogously precise way to the contending dichotomies of Roman jurisprudence: *papal donatio/imperium/mare clausum* versus *occupatio duplex/dominium/mare liberum*. It is precisely here that we must historically locate the 'Grotian moment' as an 'event'; *De Indis* is the re-translation of the contending juridical principles of the European world system into the universalising terms of the capitalist logic of the Dutch systemic cycle of accumulation.

The Iberian-Dutch succession, in turn, serves as the precise conjunctural event within the Long Cycle that signifies the transition from the 'first' to the 'second' phase of Modernity. The 'first Modernity' (c.1492–c.1650) was commensurate with the early Modern World-Economy and an early Capitalist World-Economy founded upon the principles and practices of Mercantile Capitalism. The 'second Modernity' (c.1650–c. 1945) was commensurate with the 'truly' Modern World-System and a modern Capitalist World-Economy founded upon the principles and practices of an industrial Capitalism. The transition from first to second phases is signified by the parallel transition from mercantilism to industrialisation and a comparative stabilisation or 'institutionalisation' of the axial division of global labour; in a concomitant manner, the Modern World-System, via the British cycle of systemic accumulation achieves a geo-spatial Universalism. Holland, as the first 'true' hegemon—that is, a completely capitalistic polity that is exercising the internal logic of its cycle of systemic accumulation effectively throughout the globe—is an interstitial or 'border' phenomenon, the geo-spatial locus of conjunctural transition. It was thus necessarily the case that Holland was the 'first modern economy'²³⁰ and that Grotius was the 'last' of the primitive legal scholars; Grotius' 'mental horizon' was identical with the instauration of the Dutch cycle. This allows us to re-formulate in a more precise manner the somewhat misleading identification of the 'Grotian Heritage' with the 'Westphalian Settlement' as the 'origin' of modern International Law. I have already discussed the myriad ways in which the Peace of Westphalia cannot be accurately described as 'modern'.²³¹ The true legal significance of Westphalia lies with its dual affiliation with balance of power theory and the principle of national sovereignty, the Treaty as 'symbolic validation' serving as the template for new forms of juridical discourse.²³² By the beginning of the 17th century the master sign of hegemony,

229 See above, Chapter Two.

230 See below, Chapter Five.

231 See above, Chapter Two.

232 Both 'the word *sovereignty* and the myth of *Westphalia* have a history, a history of the true power that they have exercised in framing the international state system and

or influence (*einfluss*) within the World-System was the ability to successfully enforce the balance of power. The scholarly confusion over the juridical significance of the treaty is founded upon a prior misunderstanding of temporal waves; The Peace of Westphalia is not an 'event' that acts as a decisive moment in historical change but is embedded within a conjuncture, the symbolic validation of an interstitial transition concomitant with the extension of Dutch hegemony throughout the 17th and early 18th century.²³³

These [post-1648] decades... marked the end of a century of religious strife and civil turmoil that had wrecked the old European order [of universal monarchy] and prevented the emergence of a new one. As such, the crisis of the European legal order ended with Westphalia. The Treaties [of Osnabruck and Münster] may not have laid down the principles of the new, modern law of nations and the new, modern States system. They did, however, help in creating the political [balance of power] and religious [*eius princeps, eius religio*] conditions necessary to allow the European powers to start building a new order and a new legal system. In other words, 'the modern law of nations' and 'the modern States system' only emerged in the decades *after* Westphalia. Its most important features were only laid down by the beginning of the eighteenth century. The first peace treaties expressly to state some of them more clearly were the Utrecht Peace Treaties of 1713.²³⁴

hence the international legal system.' Beaulac, *The Power of Language in the Making of International Law*, 43.

- 233 T.A. Walker, cited in Beaulac, *The Power of Language in the Making of International Law*, 90:

The territorial state had long existed in point of fact but, whilst each royal, ducal, or republican ruler of provinces had failed to recognise in his frontiers the precise limits of his jurisdiction, the sense of national independence had been held down in pupillage by the awe-inspiring shadow of a majestic common superior,

namely, Universal Monarchy.

- 234 Lesaffer, 'The Grotian Tradition Revisited', 129–30; also, 134 and 135. Hinsley has made an argument similar to mine.

Historians are liable to ante-date the completion of massive developments because of their preoccupation with origins. They are given to ante-dating the beginnings of massive developments for the same reasons and also because such developments are finally completed: when the end of one phase is usually but the preliminary to the onset of the next it is very easy to mistake the onset of another phase for the beginning of an entirely new departure. These opposite hazards have affected our assessments of the origin and evolution of the modern states' system. Only when due allowance is made for the first can it be seen that a new European states' system emerged in the eighteenth century, and not at an earlier date. Only when careful regard is paid to the second can it be seen that, for all the twists and phases it has recently undergone, the system which emerged or finally matured in Europe is the system which still holds the word in its framework.

F.H. Hinsley, *Power and the Pursuit of Peace—Theory and Practice* (Cambridge: Cambridge University Press, 1963), 153. The only qualification that I would make is that

There are two outstanding objections that may be made against my argument, both coming from the neo-Marxist tradition. The first is that it is historically inaccurate to describe the United Provinces—and, by extension, the entirety of the Dutch cycle of systemic accumulation—as *capitalist*. For Marx, Capitalism is the system of capital as a total 'social force'; as capital 'is not a thing but a social relation between persons which is mediated through things,' it follows that capitalist production 'is the first to make the commodity into the general form of all produce... In short, from the moment when labour-power in general becomes a commodity.'²³⁵ The World-Economy of the early Modern World-System is not, therefore, truly capitalist, as it is not grounded upon a thorough commodification of social and productive relations; it is merely a form of pre-capitalist circulationism.²³⁶ The second objection, which flows from the first, is that Holland was not capable of performing the hegemonic function as mercantile 'Capitalism' is objectively pre-capitalistic. Instead, the first 'true' or 'modern' Capitalist Sovereign capable of exercising capitalistic global hegemony is the United Kingdom beginning in the late 18th century; this forms the basis of Teschke's revisionist Marxist history of the development of modern international relations, which sees the truly 'modern' inter-state system as commencing only in the early 19th century.²³⁷

I have two responses to this. I believe that there are good grounds for considering the Dutch Republic to have been a fully constituted capitalist polity; I shall be revisiting this issue in Chapter Five. More immediately, and consistent with both Post-Colonialism and de-constructive criticism, I am deeply sceptical of the latent essentialism of the neo-Marxist critique.²³⁸ Apart from the wider problem of when, if ever, capital acts as a *totalising* 'social force,' it is difficult to maintain with consistency the notion of the structural shift to Modernity as occurring in the late 18th century rather than at some point in the 'long' 16th. The problem with the conventional neo-Marxist approach is that it posits an essentialising discon-

the conjunctural transformation of the 18th century was concomitant with the declining B phase of Dutch hegemony.

²³⁵ Marx, *Capital*, Volume One, 932.

²³⁶ Pieterse openly identifies the 'key weakness' of World-Systems Analysis as it being merely a circulation model! Pieterse, *Empire and Emancipation*, 42.

²³⁷ Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (London: Verso, 2003), 249–75.

²³⁸ Beaulac does an excellent job in identifying and the de-constructing the various lurking presences of essentialism in the thought of both International Law and International Relations.

In its original Aristotelian conception, 'essentialism' pertained to the belief that there exist classifications that reveal real properties of things, that is, attributes that are both necessary and sufficient for a thing to be a thing of that kind. In short, according to Aristotle, the definition of a thing is a phrase signifying a thing's essence, which would involve an analysis based on its *genus* (i.e. common element in the category of essence) and *differentia* (i.e. distinguishing part of the essence).

Beaulac, *The Power of Language in the Making of International Law*, 10 fn. 33. This perfectly encapsulates Teschke's approach to Marxist terminology and language.

tinuity between Capitalism and a generic 'Pre-Capitalism' that corresponds with an equally discontinuous rupture between the uniquely 'Modern' and the generic 'Pre-Modern'.²³⁹ This would be a problem for Teschke, as he is committed to 'explaining away' the exceedingly numerous 'surviving vestiges of feudalism' within the English polity if he is to maintain his essentialist stance of regarding the late 18th century as the pristine and self-grounding originary of the 'Modern'. Teschke himself implicitly admits as much: if Britain 'showed its neighbours the image of their future, it did so in a highly distorted way. Conversely, Britain never developed into a positive culture of capitalism, since she was from the first dragged into an international environment that inflected her domestic politics and long-term development. The distortions were mutual'.²⁴⁰ Marxian essentialism, as I have already discussed in Chapter Two, leads directly to the even graver accusation of teleology and Euro-centrism. The basic purpose of dividing such a generic, wide-ranging, and nebulous concept as 'Modernity' into an approximately cognisable 'first' and 'second' stage is to subvert both the teleology and the Euro-centrism that is so central to orthodox Marxism; this is achieved by investing the disparate non-European sites of the 'colonial difference' with an ontological and historical weight in the structural genesis of *la longue duree* commensurate with the core-zone. If Modernity can be persuasively situated within the 'long' 16th century, then exogamous relations and circulationist modes of exchange can be assigned a causal importance equal to that of the economic relationships endogenous to the European (sub-) world system; indeed, the latter can even be regarded as having been 'de-constructed' through any successful demonstration of their iterable relationships with exogamous variables. The meaning of event, conjuncture, and structure are all to be located within the multiple and diverse intersections among the heterogenous world systems. The second Dutch cycle of systemic accumulation, precisely because of its intensely heterogenous nature and interstitial position, was the conjunctural space through which the event of the Grotian Moment and the structure of the Modern World-System co-emerged.

239 For a basic World-Systems Analysis counter critique of the neo-Marxist dismissal of Circulationism as a form of essentialist Universalism, see, Immanuel Wallerstein, *World-Systems Analysis: An Introduction*, (Durham: Duke University Press, 2004), 14–19.

240 Teschke, *The Myth of 1648*, 266.

Chapter Four

Arche-Trace (II)/Dominium: Divisible Sovereignty and the VOC as Corporate Sovereign

I Divisible Sovereignty, Heterogeneity, and Deconstruction

The paradoxical intrastitital position of the Dutch Republic as lawful rebel against the Iberian world-empire on the one hand and as legitimate hegemon on the other highlights the discursive correlation between a war of national liberation and Dutch leadership within the Modern World-System. The Grotian Text had to perform the somewhat thankless task of providing an internally coherent rhetorical stratagem that would symbolically validate latently contradictory agendas: the creation of an inter-state system of formally equally States within the core zone, and the legitimation of the exploitative domination of the Periphery by these same States.

A signature characteristic of *De Indis* is the recurrent juxtaposition of contending forms of sovereignty: the binary opposition between monistic and 'divisible' sovereignty forms a cardinal antinomy of both *De Indis* in particular and of the Grotian corpus as a whole. What is at stake here, in addition to the binary structure of the Grotian Text(s) itself, is the wider issue of the textualized relationship between Europe/Self and Asia/Other. The binary opposition between the competing forms of sovereignty underscore the relative absence of *difference* between European and non-European societies, subsequent divisions themselves being the product of the successful implementation of the Modern World-System. In this way, *De Indis* reminds us of the 'structuralizing' role played by European colonialist hegemony. For Keene

It has always been hard for orthodox [International Relations] theorists to appreciate the international dimensions of relationships in the extra-European world, largely because they make the misguided assumption that their unitary conception of sovereignty has always defined the discipline of international politics and international law. They argue that international relations are relations between mutually independent states, because that is the only conception they possess as a way of thinking about the modern world; they lack the more flexible vocabulary of Grotius, and are thus at a loss to know how to describe, say, relations between the British paramount power and the 'semi-sovereign' Native States of India. What they typically do, then, is simply ignore this way of organizing international relations, perhaps giving it a breezy acknowledgement

but hastily moving on to the familiar business of international politics in the European states-system. The inadequacy of their conceptual apparatus and the narrowness of their historical vision are faults of the orthodox [i.e. 'British School'] theory that continually reinforce each other.¹

As Keene rightly points out, much of this 'statist myopia' of both International Law and International Relations is the end product of a superficial, if not actually naïve, understanding of the complex cross-currents of early modern History, which leads directly, in turn, to a facile belief in an essentialising statist 'Presence'.² Essentialism and its juro-political correlative, the indivisibility of sovereignty, are central to the space of *différance* within which *De Indis* operates. This is clear from even the most cursory reading of Grotius' near-contemporary Jean Bodin (1529/30–1596), the progenitor of Absolutist political theory.³ The entirety of Bodin's later thought is that the essentialist indivisibility of sovereignty guarantees the logical necessity of a strictly hierarchical polity.⁴ The key element of Bodin's discursive stratagem is the fusion of Civic Humanist scholarship with a thoroughgoing Aristotelian essentialism; 'But it is clear that to have true definitions and resolution in any subject matter, one must not fix on accidents, which are innumerable, but on essential differences of form. Otherwise, one could fall

1 Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002), 95.

2 See above, Chapter One.

3 Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), 28:

Since [Jean] Bodin, indivisibility has been integral to the concept of sovereignty itself. In international political theory, this means that whenever sovereignty is used in a theoretical context to confer unity upon the state as an acting subject, all that it conveys is that this entity is an individual by virtue of its indivisibility, which is tautological indeed. What follows from this search for the locus of sovereignty in international political theory, however necessary to its empirical testability, is thus nothing more than a logical sideshow; the essential step towards unity is already taken whenever sovereignty figures in the definition of political order. Whether thought to be upheld by an individual or a collective, or embodied in the state as a whole, sovereignty entails self-presence and self-sufficiency; that which is sovereign is immediately given to itself, conscious of itself, and thus acting for itself. That is, as it figures in international political theory, sovereignty is not an attribute of something whose existence is prior to or independent of sovereignty; rather, it is the concept of sovereignty itself which supplies this indivisibility and unity.

4 'The system of political power and authority put forward in *Six Livres* [1576] through the use of the word 'sovereignty' is... essentially interested in the hierarchical structure of governance in society.' Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden; Boston: Brill Academic Publishers, 2004), 117. See Julian H. Franklin, 'Sovereignty and the Mixed Constitution', in J.H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (Cambridge: Cambridge University Press, 2001), 298–328, *passim*.

into an infinite labyrinth which does not admit of scientific knowledge.’⁵ For Bodin, ‘Sovereignty is the absolute and perpetual power of a commonwealth which the Latins call *maiestas*.’⁶ From this definition flow two logically necessary propositions. Firstly, that Sovereignty, as it actually exists, both conceptually and factually, must necessarily remain indivisible in nature.

If it were otherwise, and the absolute power conceded to a lieutenant of the prince were called sovereign, he would be able to use it against his prince, who would then command his lord, and the servant his master, which would be absurd. The person of the sovereign, according to the law, is always excepted no matter how much power and authority he grants to someone else; and he never gives so much that he does not hold back even more. He is never prevented from commanding, or from assuming cognisance—by substitution, concurrence, removal, or any way he pleases—of any cause that he left to the jurisdiction of a subject.⁷

Accordingly, Sovereignty is inalienable and cannot be irrevocably delegated or conveyed to either a subordinate or to a rival Sovereign.⁸ For just as God, ‘the greatest Sovereign, cannot make a God equal to Himself because He is infinite and by logical necessity two infinities cannot exist, so we can say that the prince whom we have taken as the image of God, cannot make a subject equal to himself without annihilation of his power.’⁹

Secondly, that the resultant Sovereignty assumes the form of an exclusive supremacy, serving as the basis of an Absolutist conception of the political order.¹⁰

5 Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, trans. and edited. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 89. On Bodin’s Aristotelianism, see Kenneth D. McRae, ‘Ramist Tendencies in the Thought of Jean Bodin,’ *Journal of the History of Ideas*, 16/3 (1955), 306–23, *passim*.

6 Bodin, *On Sovereignty*, 1.

7 Ibid. 2.

8 Ibid. 6–7.

9 Ibid. 50. ‘On Bodin’s principles, no delegation of sovereign authority could have any element of permanence.’ Julian H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge: Cambridge University Press, 1973), 103.

Not surprisingly, Bodin was notorious for his unconditional rejection of that favourite categorical construction of early modern Republicanism, the ‘mixed constitution.’ Ibid. 27–9.

10 ‘Sovereignty, for Bodin, merely consisted in the highest and most general, the ultimate and final power of command. Bodin continually stressed the idea of absolutism conceived as hierarchical superiority, as distinct from absolutism conceived as the simple exercise of arbitrary control.’ Preston T. King, *The Ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes* (London: Allen and Unwin, 1974), 129–30.

A subject who is excepted from the force of the laws always remains in subjection and obedience to those who have the sovereignty. But persons who are sovereign must not be subject in any way to the commands of someone else and must be able to give law to subjects, and to suppress or repeal disadvantageous law and replace them with others—which cannot be done by someone who is subject to the laws or to persons having power of command over him.¹¹

It is abundantly clear that Bodin formulated his views on the indivisibility of sovereignty in response to the sectarian conflicts and civil wars that were threatening France in the latter part of the 16th century.¹² Yet his emphasis upon hierarchy and the political monism of the State effectively doubled as a juridical and ideological legitimation of territorialist world-empire. The main discursive differences between Bodin's *Six Livres* and Grotius' *De Indis* may, therefore, be attributable to the different roles played by their respective countries (France; Holland) within the core zone of the Modern World-System. France, as a non-hegemon but a 'strong' state, or 'major power', within the core zone, led Bodin to concentrate on the requirements of robust intra-state formation, yielding a textually constructed reification of political unity founded upon an ontological monism. As I shall discuss at greater length in Chapter Five, there exists a very clear and very precise correlation between Humanism and the unitary *civitas* with a strict monist ontology that expressly privileges a positivist construction of Law. Holland, in contrast, as the nascent hegemon (versus Portugal) within the still crystallizing Modern World-System lay at the vital nexus between intra- and interstate crosscurrents. As a result, Grotius was committed to a discursive

- 11 Bodin, *On Sovereignty*, 11; also see *ibid.* 12–15. On this basis Bodin erects an entire sign-system for the purpose of recognizing the objective 'marks' of the 'true' Sovereign.

To be able to recognize such a person—that is, a sovereign—we have to know his attributes, which are properties not shared by subjects. For if they were shared, there would be no sovereign prince... For the prerogatives of sovereignty have to be of such a sort that they apply only to a sovereign prince. If, on the contrary, they can be shared with subjects, one cannot say that they are marks of sovereignty. For just as a crown no longer has that name if it is breached, or if its rosettes are torn away, so sovereign majesty loses its greatness if someone makes a breach in it and encroaches on a part of its domain.

Ibid. 48–9. The 'marks' of sovereignty identified by Bodin include the promulgation of law; binding declarations of war and peace; the appointment of senior magistrates; serving as the court of last instance; receiving all acts of fealty and homage; the printing of currency; and confiscation of estates for the crime of treason. *Ibid.* 46–88. As we shall see in Chapters Five and Seven, Grotius also formulates a sign-system of the 'marks' of sovereignty, but along radically anti-essentialist lines.

- 12 Franklin, *Jean Bodin and the Rise of Absolutist Theory*, 41–53. Bodin's 'theoretical goal was the suspension of conflict through the elimination of all plural sources of power and authority.' Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Waterloo: Wilfrid Laurier University Press, 1999), 170.

strategy of formulating the hegemonic requirements of maritime supremacy and world-market penetration within an international schema that permitted a plurality of political actors and stratagems. Here we encounter a phenomenon that will periodically re-emerge throughout this volume; the vital interconnection between intra-state and inter-state theories of constitutional governance.

It is no exaggeration to say that in the seventeenth century, it was the more speculatively metaphysical system-builders [Bodin] who believed in the indivisibility of sovereignty, while the more pragmatic and constitutionally-minded experts on the law of nations [Grotius] were the ones who upheld the empirically verifiable doctrine that sovereignty was divisible... [Grotian Divisibility Theory] recalls the complex hierarchies of overlapping jurisdictions that... were symptomatic of medieval Christendom, and precisely the opposite of the modern world where political authority is believed to come in neat territorial packages labelled 'sovereignty'... The imperial constitution, the territorial sovereignty of the states and the reserved right of the emperor made it hard for lawyers to ignore the fact that, whatever the attractions of the Bodinian theory in principle, sovereignty was divided in practice.¹³

More appropriate to Holland's position within the World-System was the radical theory of popular sovereignty pioneered by Johannes Althusius (1557–1638), in his *Politica Methodice Digesta* (first edition 1603), a Text virtually contemporaneous with *De Indis*. There is no direct evidence that Grotius utilized the *Politica* when composing his own work. However, Grotius is frequently less than honest in his acknowledgements, and there remains a distinct possibility that Althusius was known to Grotius' mentor Oldenbarnevelt; in his capacity as syndic (legal counsellor) to the city of Emden, Althusius formed part of the legations regularly dispatched by that city to The Hague.¹⁴ More direct proof of a 'Dutch Connection' is provided by Althusius himself in the Dedication to the third edition of the *Politica* (1614), where he devotes the text 'to the illustrious leaders of the estates of Frisia between the Zuider Zee and the North Sea most worthy lords'.¹⁵

In deliberate opposition to Bodin, Althusius develops the first modern theory of Federalism, premised upon the subsidiarity, or partial divisibility, of an inalienable sovereignty that resides within *respublica*.¹⁶ Althusius deliberately utilises

13 Keene, *Beyond the Anarchical Society*, 105.

14 Carl Friedrich Joachim, 'Introduction,' in Johannes Althusius, *Politica Methodice Digesta of Johannes Althusius (Althaus)* (Cambridge: Harvard University Press, 1932), xiii-xcix at xxxviii.

15 Johannes Althusius, *The Politics of Johannes Althusius*, trans. with Introduction by Frederick S. Carney (Boston: Beacon Press, 1964), 8.

16 Thomas O. Hueglin, 'Federalism, Subsidiarity and the European Tradition: Some Clarifications,' *Telos*, 100 (1994), 37–55 at 46.

Althusius' *Politica*... was the first modern theory of federalism. The first modern conceptualisation of the principle of subsidiarity can be traced to his attempt to balance the allocation of powers between commercial self-determination and the universal re-

the United Provinces and The Eighty-Years War as his primary contemporary exemplar for the nature and operation of radical republican sovereignty.

To demonstrate this point [of the inalienability of popular sovereignty] I am able to produce the excellent example of your [i.e. the Frisian's] own and the other provinces confederated with you. For in the war you undertook against the very powerful king of Spain you did not consider that the rights of sovereignty adhered so inseparably to him that they did not exist apart from him. Rather, when you took away the use and exercise of them from those who abused them, and recovered what was your own, you declared that these rights belong to the associated multitude and to the people of the individual provinces. You did this with such a courageous spirit, with such wisdom, fidelity and constancy, that I cannot find other peoples to compare with your example. And this among other reasons leads me to dedicate these political meditations to you.¹⁷

Within the *Politica*, the United Provinces serve as an exemplar in three distinct ways. Firstly, the intra-state arrangements of the Dutch Republic provide Althusius with his leading example of (con-) federated constitutional praxis: 'It even leads me to refer very often in [the *Politica*] when illustrations of political precepts are to be used, to examples chosen from your cities, constitutions, customs and deeds, and from other confederated Belgic provinces.'¹⁸ Secondly, the Republic serves as the perfect foil to Habsburg Universal Monarchy, personified by Philip II, who is textually re-presented as the archetypal instance of the first type of anti-republican tyranny, 'the overthrow and destruction of the fundamental laws of the earth.' This form of tyranny occurs 'when the supreme magistrate violates, changes or overthrows the fundamental laws of the realm, especially those that concern true religion. Such... was Philip, king of Spain, who established an administration in Belgium by force and arms against the fundamental laws and hereditary ways of the Commonwealth.'¹⁹ Thirdly, Althusius intentionally situates The Eighty-Years War within the contours of the early Modern World-System, clearly identifying the United Provinces as the global protector of popular sovereignty.

For the success of your admirable deeds and those of your allies, is so abundant that it overflows into neighbouring countries, indeed, into all of Germany and France. It is even experienced by the nations of the Indies and many other realms plagued by Spanish arms that have been sustained and defended by you and the other provinces united with you.²⁰

quirements of Statehood... The entire polity is a federally constructed edifice of multiple layers of association.

See also, Hueglin, *Early Modern Concepts for a Late Modern World*, 52–68.

17 Althusius, *The Politics of Johannes Althusius*, 10–11.

18 Ibid. 11.

19 Ibid. 186, 188 and 185–94, *passim*, C. XXXVIII on the 'Removal of Tyrants'.

20 Ibid. 11.

The republican *Politica* is an almost inverse re-presentation of the absolutist *Six Livres*. The unifying principle of the republican text is the heterogenous concept of consociation, the pre-political community that gives rise to all formal modes of constitutional expression.²¹

Politics is the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called 'symbiotics'. The subject matter of politics is therefore association (*consociatio*), in which the symbiotes ['those who live together'] pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.²²

Consociation, in turn, permits the multiple sub division, or subsidiarity, of the unitary sovereignty of the people into an over-arching integrated federalist polity.

But the owner and usufructary of sovereignty is none other than the total people associated in one symbiotic body from many smaller associations. These rights of sovereignty are so proper to this association... that even if it wishes to remove them, to transfer them to another, and to alienate them, it would by no means be able to do so, any more than a man is able to give the life he has to another.²³

The signature innovation of Althusian federalism is that the heterogenous republic 'is not seen as a political institution which governs and controls a completely separate sphere of social and political activities, but is itself the symbiotic coordination of these activities.'²⁴ Althusius thereby eradicates any self-grounding demarcation between the public or private spheres of the polity; the resultant re-conceptualisation of both the public and the civil domains in terms of associa-

21 Thomas Hueglin, 'Johannes Althusius: Medieval Constitutionalist or Modern Federalist?', *Publius*, 9/4 (1979), 9–41 at 38.

In the last analysis, the political system of Althusius presents itself as the attempt to reconcile the medieval plurality of rule with the modern concept of sovereignty. Thus it aims at the coordination of corporate particularism and central authority. What Althusius arrives at, is neither a unitary state however administratively decentralized, nor a 'balkanisation' of a socio-political unity, which ought to jointly master its common heritage. It is, in other words, a proposal for a political system maintained by a strong sense of community but constitutionally held together by a kind of reduced or co-sovereignty.

See also, Hueglin, *Early Modern Concepts for a Late Modern World*, 85–106.

22 Althusius, *The Politics of Johannes Althusius*, 12.

23 Ibid. 10.

24 Hueglin, 'Johannes Althusius: Medieval Constitutionalist or Modern Federalist?', 22.

tive corporate ('symbiotic') structures yields an intensely heterogenous form of 'societal federalism'.²⁵

Now this axiom stands firm and fixed: all symbiotic association and life is, essentially, authentically, and generically political. But not every symbiotic association is public. There are certain associations that are private, such as conjugal and kinship families, and collegia. And these are the seedbeds of the public association. Whence it follows that the private association is rightly attributed to politics.²⁶

Thus, the heterogenous federated *respublica* is, at all times, the antithesis of the absolutist Nation-State, whose master-sign is territorialism and political centralisation.²⁷ It is within this very precise space of juro-political *differance* that the discursive apparatus of *De Indis* must be situated.

De Indis is conventionally divided into two asymmetrical parts, or 'grafts':²⁸ (i) the *Historica*, primarily Chapter XI, which provides the historical discussion of the background to the seizure of the *Santa Catarina*, and (ii) the *Dogmatica*, all of the other chapters, dealing with the substantive legal issues concerned with the Dutch struggle against Portugal as an instance of Just War and the lawful classification of the carrack as a maritime prize. When examined in detail, the *Historica* is revealed to display a sophisticated understanding of the phenomenological evolution of the Modern World-System, in which Dutch and Portuguese antagonism were governed by historical necessity: 'a just cause of war exists when the freedom of trade is being defended against those who would obstruct it'.²⁹ This interstate conflict is juridically reconfigured in terms of the latent incompatibility of two rival taxonomic categories of property rights, *dominium* and *occu-*

25 Hueglin, *Early Modern Concepts for a Late Modern World*, 109–35.

26 Althusius, *The Politics of Johannes Althusius*, 27.

Thus, on any level of association, the higher units are always composed of lower ones, which, as such collective bodies constituting the higher unit, retain self-determination in their sphere as singuli... [Althusius] does not present his political system in terms pyramidal construction logically progressing from the bottom to the top level, but rather as a matrix-construction, which contains various organizational patterns within various arenas or cells of smaller and larger associational units. It is a network of political and social relations which on the whole reflects the plurality of late medieval society, but which appears to be transformed into a coherent constitutional system.

Hueglin, 'Johannes Althusius: Medieval Constitutionalist or Modern Federalist?', 28.

27 Hueglin, *Early Modern Concepts for a Late Modern World*, 42–55.

28 In the Introduction to this volume, I have tentatively suggested that *De Indis* in fact exhibits the characteristics of a tri-partite division: *Prolegomena*, *Historica*, and *Dogmatica*.

For the purposes of the discussion in this chapter, I will adhere to the orthodox bi-partite division.

29 Hugo Grotius, [*De Indis*] *De Iure Pradae Commentarius. Commentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (Wildy & Sons: London, 1964), 202.

patio (or, *occupatio duplex*); in this sense, the two contending hegemonic states, Holland and Portugal, do little more than serve as discursive signifiers of anti-theoretical juridical principles. What links the two on a deeper meta-narrative level, is the question of 'Universal Monarchy'. For the Iberians, this meant the global legitimation of a territorialist world-empire, while for the Papacy it signified the reactionary triumph of a theocratic model of international public order. *De Indis* serves as both an anti-Portuguese and anti-Papal text, striving to discursively de-legitimize both the symbolic validation of and the material preconditions for Universal Monarchy.

II Thomism Contra Papalism

Derived from the work of St. Thomas Aquinas (1225–74), Thomism sought to circumscribe the 'Papal Revolution' through 'reading down' the limited secular papal power *in temporalibus* to the unlimited scope of papal jurisdiction *in spiritualibus*. The basis for neo-Thomistic opposition to Papal Monarchy is provided in Aquinas' *Summa Theologica* II.II (*Secunda Secundae*), which provides a juridical taxonomy of the tripartite division of Natural Law: the preservation of Mankind; the preservation of society; and the proper reverence of God, the first two being the necessary derivatives of the third. Aquinas' Natural Law schema, in turn, is inseparable from his taxonomy of Property Law, Title as distinct from 'Right', or *ius*. The difficulty here is in part etymological. In medieval jurisprudence, *dominium* does not appear to equate to 'property' (*proprietas*), but rather to 'any form of superior power, with a connotation of authority, superiority, jurisdiction';³⁰ significantly, in classical Latin, *dominium* does denote private ownership.³¹

Dominium was simply the ultimate legal title beyond and above which there was no other. All actual enjoyment might have been given to others—another might be bonitary owner, someone else might have a usufruct in a thing—but the dominus remained dominus, although a bare legal titulary. This ultimate title rested in the last *civis* [citizen] to acquire the thing by a recognized Roman process and remained with him until acquired in a similar manner by another *civis*.³²

There is a strong temptation to effectively reduce *dominium* to either property as such or, at least, to a proprietary interest. In any event, it appears certain that *dominium* is closely linked to *ius*, understood as 'right'; the vital connection is

30 'It is, in truth, difficult [to] satisfactorily define *dominium*.' J.A.C. Thomas, *Textbook of Roman Law* (Amsterdam: North-Holland Publishing Company, 1976), 133. J.H. Burns, *Lordship, Kingship, and Empire: The Idea of Monarchy, 1400–1525* (Oxford: Clarendon Press, 1992), 16–21.

31 Brian Tierney, 'Tuck on Rights: Some Medieval Problems', *History of Political Thought*, 4 (1983), 429–41 at 431.

32 Thomas, *Textbook of Roman Law*, 134.

that only a valid proprietary claim can give rise to a legally enforceable right.³³ *Dominium*, in fact, appears to have been derived from an earlier form of an explicit property right, *pater familias*, *familia* serving as the foundational legal unit within the early Roman state.³⁴ The collapse of Roman civic government in the Middle Ages was accompanied by a parallel shift in the meaning of *dominium*, from publicly regulated property to 'privatised' lordship.³⁵ The evolution of medieval property law replicated in inverted form the earlier Roman pattern of development, signifying the extreme iterability between pre-modern conceptions of the 'private' and 'public' realms.

'Lordship' might take the form of property in the narrow meaning of the term when material things were subjected to the Lord, or it might take the far wider form of personal subjection of one man to another in which later case one could speak of governmental authority. For both it was essential that the exercise of power was lawful, that is, that there was a right to its exercise.³⁶

As a result, *dominium* came to be identified with the property item, or *res*, over which it was exercised (*dominium rerum*), the physical transfer of the thing signifying transfer of 'ownership'.³⁷ In order to establish *dominium*

The thing [*res*] had to be *in commercio*, i.e., capable of being owned and untainted by any flaw such as being a stolen thing, a *res furtiva*; the acquirer had to have *commercium*, that is, the right to use the processes of *ius civile*, as had also the transferor in a

33 Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 10–48.

34 Thomas, *Textbook of Roman Law*, 411–18.

35 Ibid. 134:

The virtual inability to satisfactorily define *dominium* has an historical explanation. There was originally simply the object over which the head of the household had power, in effect, on a factual basis; a power undifferentiated, initially, from that which he had over his wife *in manu* and over his children *in potestate*. All were simply his: relics of this primitive amorphous conception of the position of the *pater familias* still existed in developed law as *dominium*.

36 Walter Ullmann, *Medieval Political Thought* (Harmondsworth: Penguin Books, 1975), 125.

In a feudal society, of which the leading characteristic was the holding of lands by lords (*domini*), lordship was an absolutely basic fact of social life: *dominium* was therefore an essential concept in the juristic articulation of the social order. The problem was that feudal relationships did not allow for any such absolute and exclusive right as Roman *dominium* implied.

J.H. Burns, *Lordship, Kingship, and Empire: the Idea of Monarchy, 1400–1525* (Oxford: Clarendon Press, 1992), 18.

37 Thomas, *Textbook of Roman Law*, 151.

case of derivative acquisition; and the thing had to be acquired by a recognized legal process and, again in a derivative acquisition, from one who was himself *dominus*.³⁸

These etymological considerations must now be deployed in resolving the more immediate problem of precisely how neo-Thomism governed the contending juridical discourses of Portugal and Holland as contending hegemonies. Clarity is achieved by interpreting Aquinas in expressly political and ideological terms; the political sub-text infusing Thomist discourse is the systematic refutation of any theo-political basis for *in temporalibus*. Discussing Genesis 1.28,³⁹ Aquinas argues that God's conveyance of 'dominium of the Earth to Man,' although predicated upon the species' natural intellect (itself a consequence of Providence) and potentially universal in application, is a purely *usufructuary* right: 'God has pre-eminent dominion [*principale dominium*] over all things, and in his providence he ordered certain things for men's material support. This is why it is natural for man to have dominion over things in the sense of having the power to use them [*potestatem utendi*].'⁴⁰ There is no inalienable right or title conveyed, but merely a general dispensation for practical use and licit exploitation (i.e. *usus et fructus*: 'for he [Man] has a mind and a will with which to turn [things/*rebus*] to his own account [*ad suam utilitatem*].')⁴¹ Aquinas then makes a crucial move: Creation, in its entirety, is not Man's natural *dominium* but a commonly held property, (*communitas rerum*), which serves as the foundation of all subsequent and derivative man-made investitures of exclusive title (*proprietas*).⁴² There are no subjective rights (*ius*) in title as such; Man's universal *dominium* is natural and, therefore, common/*communio*, governed directly by the Natural Law (*ius naturale*) principles of *usus et fructus*:⁴³ 'Man's... competence is to use and manage the world's

38 Ibid. 133.

39 Thomas Aquinas, *Summa Theologiae, Volume 38: Injustice (2a2ae. 63-79)*. Translation with Introduction by Marcus Lefebure (New York: McGraw-Hill Book Company, 1975), Q. 66, 64-5.

40 Ibid.

41 Ibid.

42 Burns, *Lordship, Kingship, and Empire*, 22-5. 'Both the justification of private property rights and their limitations turn on considerations of rational communal utility more basic than positive titles.' Arthur Stephen McGrade, 'Rights, Natural Rights, and the Philosophy of Law', in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100-1600* (Cambridge: Cambridge University Press, 1982), 738-56 at 739; see also D.E. Luscombe, 'The State of Nature and the Origin of the State', Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100-1600* (Cambridge: Cambridge University Press, 1982), 757-70 at 761-3.

43 In Aquinas' own terms of reference, therefore, there was no possibility of any kind of theory of 'possessive individualism' in the late Middle Ages. See Tierney, 'Tuck on Rights', *passim*.

resources. Now, in this regard, no man is entitled to manage things merely for himself, he must do so in the interests of all, so that he is ready to share them with others in the course of necessity.⁴⁴ Licit private title/*proprietas* can only emerge, if at all, in a social/secular manner that can be shown to be subordinate to and consistent with Providential Being (or, in Derridean terms, 'Presence').⁴⁵ *Communio* is the antithesis of the derivative/non-self-sufficient 'particular' title (*proprio*), and *dominium* signifies the universal capacity of using common property in the right manner.

Community of goods [*communitas rerum*] is said to be part of natural law [*ius naturalis*] not because it requires everything to be held in common and nothing to be appropriated to individual possession, but because the distribution of property is a matter not for natural law but, rather, human agreement [*secundum humanum conductum*], which is what positive law [*ius positivum*] is about... The individual holding of possessions is not, therefore, contrary to the natural law, it is what rational beings conclude as an addition to the natural law.⁴⁶

Temporal lordship, therefore, is inextricable from common interest.⁴⁷ In other words, legitimate claims to exclusive title must be grounded upon precise ontological criteria that the prospective Hierarchy will almost certainly fail to meet.

III Conciliarism and Heterogeneity

The discursive precariousness of Iberian imperium is even more clearly revealed through the Thomist critique of Papal Monarchy. Not surprisingly, Thomism played a central role in the rise of the Conciliarist movement of the 14th and 15th centuries, the attempt to transform Christendom into a *res publica* through subordinating the papal curia to a pan-European legislative assembly of ecclesi-

44 Aquinas, *Summa Theologiae*, Vol. 38, Q. 66, 68–9.

45 Wilhelm G. Grewe, *The Epochs of International Law* (New York: Walter de Gruyter, 2000), 84:

The lowest stratum [of Creation] comprised the *lex humana*—the positive law or *ius positivum* issued by a human legislator. Just as natural law was derived from divine law and remained incorporated within and could not contradict it, so human law was only binding insofar as... 'it is derived from natural law... if it differs from natural law, it is no longer a law but a corruption of law.'

Aquinas rigorously follows the logic of *descending* hierarchical relationships. See D.E. Luscombe, 'Natural Morality and Natural Law,' Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100–1600* (Cambridge: Cambridge University Press, 1982), 705–19, *passim*.

46 Aquinas, *Summa Theologiae*, Vol. 38, Q. 66, 68–9.

47 Burns, *Lordship, Kingship, and Empire*, 24–5.

astical potentates.⁴⁸ What concerns us here is the inextricability of broader trends in European constitutional thought and the narrower innovations in Scholastic property doctrine.⁴⁹ To a very great degree, Conciliarism represented Thomistic metaphysics ‘made flesh’—both bodies of thought constituting specifically *theo-political* discourses.⁵⁰ Both the Hieratic and anti-Hieratic positions reflected competing metaphysical assumptions, conventionally labelled ‘Realism’/Platonism⁵¹ and ‘Nominalism’/Aristotelianism.⁵² The legitimization of Papalism as an institutionalised embodiment of *Universalis Monarchia*, required a unitary, or ‘monistic’ theory of Being;⁵³ this was directly threatened by the systemic Thomis-

48 Conciliarism was ‘an attempt to modify and limit papal control over the Church by means of general councils.’ Antony Black, ‘The Conciliar Movement’, in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), 578–87 at 583.

Probably the most revolutionary official document in the history of the world is the decree of the Council of Constance [1415] asserting its superiority to the Pope [*haec sancta*], and striving to turn into a tepid constitutionalism the Divine authority of a thousand years. The movement is the culmination of medieval constitutionalism.

John Neville Figgis, *Political Thought from Gerson to Grotius, 1414–1625: Seven Studies*, with introduction Garrett Maddingly (New Hork: Harper Torchbooks, 1960), 41.

49 ‘The Thomist premise of natural law and the social principle of man as a political animal, given an individualistic emphasis, gave scope to the theory of contract and ultimately popular sovereignty.’ Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge: Cambridge University Press, 1963), 136.

50 For Thomism and medieval Theology more generally as constituting deliberate and self-conscious forms of political theory, see Francis Oakley, *The Political Thought of Pierre d’Ailly: The Voluntarist Tradition* (New Haven: Yale University Press, 1964), 32 and 237–8. Throughout the later middle ages,

there was no more genuine agreement about the nature of medieval society than there was about the problem of universals or the exact relationship of reason and faith. Indeed, the failure to find a universally accepted philosophical system was itself the root cause of the conflicts in medieval political thought. The constitutional theories of the age were no more than an expression in terms of government of all the discordant elements in contemporary philosophy.

Wilks, *The Problem of Sovereignty in the Later Middle Ages*, 17.

51 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 141 and 585–607.

52 Ibid. 139–43, 176 and 607–8.

53 Wilks, *The Problem of Sovereignty in the Later Middle Ages*, 18.

When translated into terms of political organization [the] marriage of Christianity and Platonic realism could only produce the idea of an essentially totalitarian society founded on the principles of the Christian faith. Realism and revelation in philosophy were united to theocracy in politics in the conception of a single monarchically governed Christian society which was the Universal Church... It was this idea of *Ecclesia*, the as-

tic reliance upon a newly recovered Aristotelianism.⁵⁴ Thomism constituted a 'modified' or 'moderate' form of Realism, blending 'Universals' and 'Particulars' together,⁵⁵ in a manner highly subversive of sacerdotal *imperium*.

A more present danger to the hieratic system lay in the Thomist answer to the problem of universals and of the relationship of part to whole, and it was here that a more definite break was made with the monistic realism which inspired the papal system of government. For the realist it was the universal which had real existence rather than the individual, and this had led straight to a totalitarian conception of society in which the preservation of the wholeness of the *Ecclesia* was the prime consideration. But since the twelfth century there had been a much more popular philosophical pursuit than the preaching of a rigidly logical and consistent system of thought into which all had either to be fitted or discarded. This new pursuit was the combination of realism and nominalism, the 'solving' of the problem of universals, and nearly every great scholastic thinker made his attempt and duly claimed to have found the answer.⁵⁶ Nevertheless during the thirteenth century these solutions returned a moderately realistic flavour. Similarly in politics there was an attempt to combine competently opposed constitutional systems, more specifically an absolute and monarchic structure of government with one that contained more than a hint of popular sovereignty. In other words an attempt was being made to combine a realistic conception of the right order in that the universe was a nominalistic one, and this had its effect in both philosophy and politics. The best example of this movement... is provided by Aquinas.⁵⁷

The philosophical coherence of *monarchia universalis* was ultimately predicated upon some variant of Realism, even if only 'weak'. The challenge presented by Nominalism lay in its capacity for fracturing the holistic totality of ontological Being unifying juro-political space, and allowing the emergence of a plurality of

sumption that all Christians and potentially all men formed a single corporate political entity, which provided the basis on which the entire hierocratic system rested.

See Alan Gewirth, *Marsilius of Padua and Medieval Political Philosophy* (vol. i of *Marsilius of Padua, The Defender of the Peace*) (New York: Columbia University Press, 1958), 14–20, 37–8 and 959.

54 Berman, *Law and Revolution*, 103, 131–2, 142–3 and 147–9. Ullman defines Thomism as 'Christian Aristotelianism'. Ullman, *Medieval Political Thought*, 174.

55 Ibid. 141:

The nominalists... although they shared with the realists a deep concern to establish general principles and to prove the validity of general concepts, nevertheless denied that such principles and concepts exist as such. The nominalists believed that universals are produced by the mind, by reason and will, but that at the same time, they inhere in the particulars they characterize, and can therefore be tested by those particulars.

56 Wilks, *The Problem of Sovereignty in the Later Middle Ages*, 119: 'The declared aim of what we may term the Thomist school of political thought was the acceptance of all the conflicting theories, hierocratic and non-hierocratic, of society and government, and the demonstration of their final harmony with each other.'

57 Ibid. 129.

(semi-) autonomous entities, each one relatively self-sufficient in its respective 'space' of being; in the terms of international politics, the dissolution of monistic unity and its replacement with a dualistic plurality.⁵⁸ Expressed in juro-political terms, *societas* is radically pluralized, an egalitarian heteronomy of co-determinant sovereignties.⁵⁹

The legal capacity and the legal rights and duties of a group, like the legal capacity and legal rights and duties of an individual, are derived from the same sources from which all law is derived, including divine law and natural law as well as the positive law of the Church and of the secular polities.⁶⁰

The relative prioritisation of the Particular at the expense of the Universal created a discursive space within which 'speech acts' (*langue* vs. *parole*) of personal or subjective rights could emerge,⁶¹ which served a vital rhetorical function within the Conciliarist movement.⁶²

In a manner that directly parallels Koskenemmi's critical deconstruction of contemporary legal discourse, Ullman has formulated a model of the political discourse of the Middle Ages.⁶³ For Ullman, the political language of the medieval period constituted two separate forms, both an 'ascending' and a 'descending' mode of argument, each corresponding to a different metaphysical basis. The

58 For the arch-Nominalist William of Ockham,

the cardinal principle of life is the belief that everything which exists is a single thing. To him *ens* and *unum*, being and one, are identical... This reduction of all existence to individual existence is the essence of nominalism, and it was this emphasis upon the individual in Ockham's thought which completely reversed the traditional hierocratic view of the relationship existing between the whole and its parts, between the community and its members, as well as transforming the idea of sovereignty itself.

Ibid. 93; see also, *ibid.* 93–5, 106–7 and 134.

59 J.A. Fernandez-Santamaria, *The State, War and Peace: Spanish Political Thought in the Renaissance 1516–1559* (Cambridge: Cambridge University Press, 1995), 76–8.

60 Berman, *Law and Revolution*, 607.

61 Brian Tierney, 'Origins of Natural Rights Language: Texts and Contexts, 1150–1250,' *History of Political Thought*, 10 (1989), 615–46 at 626–46.

If the development of a natural rights theory really required a formal philosophical basis... a perfectly adequate one was provided by the moderate realism (or moderate nominalism) of the twelfth-century schools, which attributed reality primarily to individuals, and to universal qualities only insofar as they inhered in individuals.

Ibid. 626.

62 Brian Tierney, 'Villey, Ockham and the Origins of Individual Rights,' in John Witte and Frank S. Alexander (eds), *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars Press, 1988), *passim*; Brian Tierney, 'Ockham, the Conciliar Theory, and the Canonists,' in *id.* *Church Law and Constitutional Thought in the Middle Ages* (London: Variorum Reprints, 1979), *passim*.

63 Walter Ullman, *Principles of Government and Politics in the Middle Ages* (London: Methuen, 1961), 19–26 and 288–305.

ascending form broadly equates with populism, authority (*auctoritas*) derived from the republican principle of the *populus* as the source of sovereignty: *voluntas populi*. This necessitates the division of the political community into a plurality of representative bodies and organs.⁶⁴ In contrast, the descending form, *voluntas principis*, emanates from theocratic kingship. In neo-Platonic terms, the 'one supreme organ in whom all power is located and who hands it downward is God Himself who has appointed a vice-regent on earth: in actual fact it is the vice-regent who possesses the sum total of power, having himself derived it from God.'⁶⁵ For Ullman, the history of medieval political thought may be (approximately) characterised as a perpetual alternation between republican and theocratic modes of discourse, each grounded in a variant notion of *ius naturale*. Although Ullman's interpretation must not be applied deterministically, the rise of the Conciliarist movement within the 14th and 15th centuries in fact accords well with the parallel discursive movements between ascending/descending and neo-Thomism/neo-Platonism. Within Conciliar discourse, *Ecclesia*, as a composite or corporate body,⁶⁶ possesses no reality apart from the sum aggregate of its divisible parts;⁶⁷ the Church, like any other polity, 'was at one and the same time a body composed of a plurality of human beings and an abstract unitary entity perceptible only by the intellect.'⁶⁸ As a result, Conciliarism postulates a moderate Realist-derived delegation theory of *auctoritas*, yielding a prototypical theory of Divisible Sovereignty.⁶⁹ The corporate model of *universitas regni* underpins the community's right to exercise *iurisdictio* against the ruler himself, in this case

64 Ibid. 20.

65 Ibid. 21.

66 Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge: Cambridge University Press, 1955), 117 and 131.

67 'As Aristotle had said, it was essentially the *notion* of the whole which was prior to its parts, and the hierocratic writers had made a serious error in assuming that the sovereign *Ecclesia* was always a direct and present reality.' Wilks, *The Problem of Sovereignty in the Later Middle Ages*, 130–31.

68 J.P. Canning, 'Law, Sovereignty and Corporation Theory, 1300–1450', in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), 454–76 at 473. As Kantorowicz points out, 'to the extent... that the Church was interpreted as a polity like any other secular corporation, the notion *corpus mysticum* itself was charged with political meaning.' E.H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957), 203; Wilks, *The Problem of Sovereignty in the Later Middle Ages*, 120–1.

69 'The conciliar theme, in fact, is entirely centred upon the idea of consent and representation.' Jeanine Quillet, 'Community, Counsel and Representation', in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), 520–72 at 561. Brian Tierney, 'Divided Sovereignty at Constance: A Problem of Medieval and Early Modern Political Theory', in id. *Church Law and Constitutional Thought in the Middle Ages*, 238–56, *passim*.

the Pope.⁷⁰ For Conciliarists such as Juan de Segoria (1393–1458), *auctoritas* ultimately depends upon the ruler's judgement being

presumed to conform to the will over whom he provides for the benefit of the republic and themselves... But if it happens that the whole community assembles together, and its assertions and wishes contradict those of the president, since truth is preferred to fiction, the community will deservedly prevail. For the truth is that this community is many persons, and the fiction is that this president, who is really one person, is said to be many by representation.⁷¹

The republican implications of moderate Realism for sacerdotal *imperium* were drawn most clearly by Fransiscus Zabarella (1360–1417).⁷²

When it is said that the pope has fullness of power [*plenitudo potestatis*], this should be understood of him, not alone, but as head of the corporation, in such a way that this power is in the corporation itself as in its foundation, and in the pope as principal executive, through whom this power is deployed.⁷³

Although Conciliarism ultimately failed to displace Papal monarchy, it served as an immediate progenitor of both the Protestant Reformation and the Catholic 'Counter-Reformation' movements of the 16th century, culminating in the institutionalised anti-sectarianism of the 'Westphalian Settlement'.⁷⁴ In other words, a pluralistic interstate system, the political precondition for the Modern World-System, received its foundational symbolic validation through the modified neo-Realism of neo-Thomism. Within Aquinas' doctrine of

70 'Throughout, the main problem was to justify conciliar action against a recalcitrant pope. The Conciliarists invoked 'equity' (*epieikeia*): positive law needs to be supplemented by actual practice, which justifies emergency means to the self-evidently desirable goal of unity.' Black, 'The Conciliar Movement', p. 576. Figgis, *Political Thought from Gerson to Grotius, 1414–1625*, 468, 63.

71 Black, 'The Conciliar Movement', 581. See Antony Black, *Council and Commune: The Conciliar Movement and the Fifteenth-Century Heritage* (London: Burns & Oates, 1979), 162–6.

72 Tierney, *Foundations of the Conciliar Theory*, 220–37.

73 Black, 'The Conciliar Movement', 578.

74 Ibid. p. 573:

What emerged as the practical alternative to papal centralisation was devolution of power to secular rulers and nation-states. During the schisms of 1378, 1417 and 1437–49, ecclesiastical policy and the allegiance of clergy and peoples were to a great extent determined by princes, foreshadowing *cuius regio, eius religio*. In 1418, and again in 1447–50, matters were settled by the concordats between the papacy and the various secular powers. The 'Christian republic' [*respublica christiana*] had become a very loose confederation.

Natural Law the medieval idea of [Universal Monarchy] was revived in a new form in which, without diminishing the sovereignty of the several states, it undertook to derive the connection subsisting among them in international law from a permanent and indissoluble Society of States. For since the sixteenth century, it became ever more common to base the obligation of the *jus gentium* on the 'societas gentium' of natural law. In which the original and indelible unity of mankind always gains a legal expression while at the same time full sovereignty is secured to each nation. To be sure, the idea of the Society of States consistently threatened to go over into the idea of the World-State, which was then constituted as a World-Republic simply by way of contrast to the medieval World-Monarchy.⁷⁵

Of special importance here is the inseparable correlation between sixteenth-century Republicanism and modified neo-Realism. Within the Protestant tradition, the connection is most clearly evidenced within Calvinism with Calvin's reorganisation of political society grounded directly upon 'a presbyteral and synodal form of Church government.'⁷⁶ The apotheosis of Calvinist political doctrine was attained with Althusius, 'the political theorist of Calvinism *par excellence*.'⁷⁷ Symbiotics is an intrinsically Calvinist notion;⁷⁸ the 'covenant', or *foedus*, serving as the basis of a specifically 'federal' notion of moral and social order.⁷⁹

Conversely, modified Realism served as the basis of both Dominican and Jesuitical anti-papalism and allowed for the emergence of a specifically Catholic form of republican theory, premised upon a highly modified form of Conciliarism. It is of the greatest historical importance that neo-Thomism was enthusiastically taken up by the leading Catholic jurists of the 16th century, both the Dominicans (Vitoria; de Soto) and the Jesuits (Suarez; la Molinas), who served, not coincidentally, as the very first generation of primitive legal scholars. Ironically, what Spain failed to achieve on the political front, it more than successfully accomplished on the theo-ontological front. The precise historical correlation between the foundation of International Law and post-Conciliarist opposition to the hieratic

75 Otto von Gierke, *The Development of Political Theory* (New York: Howard Fertig, 1966), 262.

76 Ibid. 69.

77 Frederick S. Carney, 'Translator's Introduction', in Johannes Althusius, *The Politics of Johannes Althusius* (Boston: Beacon Press, 1964), xiii-xxxvii at xvii. 'The politics of Althusius grew in the soil of a definite religious view of the world. It bears the stamp of the Calvinist spirit throughout.' Gierke, *The Development of Political Theory*, 69. For Althusian political Calvinism more generally, see Hueglin, *Early Modern Concepts for a Late Modern World*, 56-70, *passim*.

78 Sheldon S. Wolin, 'Calvin and the Reformation: The Political Education of Protestantism', *American Political Science Review*, 51/2 (1957), 428-53, *passim*.

79 Daniel J. Elazar, 'The Political Theory of the Covenant: Biblical Origins and Modern Developments', *Publius*, 10/4 (1980), 3-30 at 9. For the centrality of the Mosaic Decalogue within Calvinist political theory, see Althusius, *The Politics of Johannes Althusius*, 17, and Wolin, 'Calvin and the Reformation', 446.

Universal Monarchy is discursively grounded upon the Thomist exposition of a comparatively 'thin' form of juridical ontology;⁸⁰ 'the great revival of Thomism in the sixteenth century involved placing political philosophy on a more objective foundation and granting to subjective rights [*ius*] a more limited purchase, by grounding both in Aquinas' conception of natural law.'⁸¹

Once again, we witness a vital convergence between theo-ontological and World-System considerations. The nexus linking the republican traditions within both the Reformation and Counter-Reformation eras-temporally commensurate with the 'long' 16th century of Iberian hegemony—was the common shift towards a relatively 'thick' ontological variant of Natural Law discourse that allowed for both the partial divisibility of sovereignty and the investiture of a plurality of political actors with a degree of legal and constitutional identity. As was already clear to the primitive legal scholars, the 'thin' ontology of Civic Humanism inexorably led to an exclusively positivist jurisprudence that was highly compatible with political hierarchy and absolutist territorialisation. Bodin epitomised this tendency.

For there is a great difference between right (*droit*) and law (*loi*). Right is based on pure equity; law implies command. For the law is nothing but the command of a sovereign making use of his power... [In] matters of state, the master of brute force is the master of men, of the law, and of the entire commonwealth.⁸²

80 In a highly controversial move, some historians have tentatively identified Conciliarism as a rival non-Humanist source of republican government. 'Perhaps we shall eventually learn to see civic humanism and conciliarism as two alternative strategies through which the communal ethos of the Middle Ages was transmitted to the modern world.' Brian Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150-1650*, 87. See Black, *Council and Commune*, 162–93; Zofia Rueger, 'Gerson, the Conciliar Movement and the Right of Resistance (1642–1644)', *Journal of the History of Ideas*, 25 (1964), 467–86, *passim*. Gierke considered as Conciliarism's greatest feature

that in the course of time the Church is even more sharply and distinctly conceived as a 'Polity', which must be governed by the constitutional model which had already been framed for the State by combining 'antique' ideas with the basis of Natural Law. In the end indeed the Church is said to be charged with the mission of realizing the ideal of a perfect political constitution. Here indeed, while it utilised, established and developed the idea of an inalienable and imprescriptible sovereignty of the whole community, based on Divine and Natural Law, it contributed immensely to the success of the political doctrine of popular sovereignty.

Gierke, *The Development of Political Theory*, 48.

81 James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980), 65–6.

82 Bodin, *On Sovereignty*, 38 and 108. For Gierke, the 'exaltation of the idea of sovereignty drove steadily toward the conception of the State's power as an absorptive omnipotence, so that the power of other societies [such as Althusius' Family and *collegia*] could be conceived only as an effluence from the State.' Gierke, *The Development of Political Theory*, 265.

Consistent with the centralizing tendencies of the Absolutist State, customary law, which may be more directly reflective of local practices and extra-political societal norms, are rigorously subordinated to the unilateral exercise of sovereignty encapsulated within statute.

[Custom] acquires its force little by little and by the common consent of all, or most, over many years, while law appears suddenly, and gets its strength from one person who has the power of commanding all. Custom steps in softly and without violence; law is commanded and promulgated by power, very often against the subject's wishes; and for that reason Dio Chrysostom compares custom to a king, law to a tyrant. Law, furthermore, can repeal customs, while if custom should detract from law, the magistrate, and those who are charged with making sure the laws are kept, can have the law enforced whenever they see fit... To put it briefly, custom has no force but by sufferance, and only in so far as it pleases the sovereign prince, who can make it a law by giving it his verification. Hence the entire force of civil law and custom lies in the power of the sovereign prince.⁸³

With the rhetorical migration from a relatively 'thin' to a relatively 'thick' ontology, however, it became possible for primitive legal scholars to demonstrate that political society is

rooted in the Law of Nature; that by the Law of Nature the united community is vested with sovereignty over its members; that all rights of membership are derived from the will of the community, which is by the Law of Nature empowered and bound to transfer its own power. Of course they do not give up the principle that the State is grounded on the will of God and that all power is of God; but more and more they develop for this principle an interpretation which does not conflict at any point with the construction of the State by the pure law of reason, and which holds together simply that in the last resort nature and natural reason, together with the relations, rights, and duties based upon them, are emanations from the Divine Being.⁸⁴

Neo-Thomism thus permitted an express move towards a purely voluntaristic notion of political community, as the 'Divine Being'—a highly adaptive 16th century notion of 'Presence'—served as the self-grounding Trace for the legitimation and auto-interpretation of 'true' *auctoritas*; it also very effectively doubled as the basis for a primitive form of Social Contract Theory.⁸⁵

The State is the product of a free contract and the form of the State is determined by a free choice; but the impulse to associate and to institute rulers comes from Nature and

83 Bodin, *On Sovereignty*, 57–8.

84 Gierke, *The Development of Political Theory*, 73.

85 Ibid. 91–142.

Nature's God. The people elects and gives power to the ruler, but at the same time God through the medium of the people gives him his right and mandate.⁸⁶

Accordingly, Gierke is able to historically identify a Reformationist theo-political jurisprudence as the discursive template for the inter-state system of the 'long' 16th century, one that was directly reflective of newly emergent forms of republican intra-state arrangements; in

the question of the centralizing or federalistic construction of the State, everything depended on whether and how far, within the unitary State, the exclusive sovereignty of the whole, which is thereby characterized as a State, was compatible with a separate and independent communal life of the partial societies.⁸⁷

Within the Calvinist political tradition Althusian Federalism constituted the deliberate and self-conscious repudiation of a centralizing Absolutism in strict accordance with the conventual doctrine of popular sovereignty and the 'negation of the World-State'.⁸⁸ For their part, the Spanish jurists, although wholly orthodox concerning *in spiritualibus*—this as a valuable device in the legitimation of interstate territorialism such as Iberia's 'acquisition' of the West Indies⁸⁹—had to unconditionally reject *in temporalibus* as inconsistent with Iberian anti-Absolutist intrastate development.

IV Suarez and Neo-Thomism

Critical to the re-formulation of neo-Thomism in terms of Primitive Legal Scholarship are the works of the neo-Thomist Suarez.⁹⁰ Of central importance here is the discursive severance of *communio* from *proprietas*, the proprietary expression of the neo-Thomist privileging of the Particular at the expense of the Universal.⁹¹ The metaphysical foregrounding of the Particular facilitates the discursive emergence of territorial sovereignty⁹²; herein, the iterability between 'Private' and 'Public' domains allows for the 'particular' State to mimetically represent the 'individual' Person.

86 Ibid. 75.

87 Ibid. 263.

88 Ibid. 264.

89 Black, *Council and Commune*, 197, 202–3 and 212.

90 Pauline C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (Leiden: Brill, 1996), 77–128.

91 In broader terms, the affirmation of a modified Realism in place of a full-fledged Nominalism.

92 Ullmann, *Medieval Political Thought*, 195–99.

Proprietas is now one derivative subset of rights (*ius*) signifying an ontologically inferior form of exclusive title/possession, now expressly identified with *dominium*.⁹³

Justice is said to be the virtue that renders to every man his own right (*ius suum*), that is to say the virtue that renders to every man that which belongs to him. Accordingly, this right to claim (*actio*), or moral power [*facultas*], which every man possesses with respect to his own property or with respect to a thing which in some way pertains to him, is called *ius*, and appears to be the true object of justice.⁹⁴

Largely avoiding the strict hierarchical descent of the original Thomistic texts, Suarez labours to demonstrate how both Providential and Natural Law complement each other, yielding identical outcomes: 'Nature has conferred upon all men in common dominion over all things; but nature has not so conferred private dominion.'⁹⁵ The non-natural status of *proprietas* is inextricable from the corresponding practical exercise of subjective right/*ius*; for Suarez, as for all of the other primitive legal scholars, *ius* 'is properly bestowed on a certain moral power which every man has, either over that which is rightfully his own or with respect to that which is due him. For it is thus that the owner of a thing is to have a right (*ius*) in that thing.'⁹⁶ *Ius ad rem* is now redeployed to signify the Thomistic *communitas rerum*: 'For we have said that right [*ius*] is sometimes law [*lex*]: while at times property [*dominium*] or quasi-property over a thing; that is, a claim to its use.'⁹⁷ *Communitas rerum* now becomes an inclusive right, within which all have a positive and enforceable duty to respect everyone else's *ius*, now governed directly by *usus et fructus*: '[There is] a positive precept of natural law to the effect that no one should be prevented from making the necessary use of the common property.'⁹⁸ According to Tully, 'at this point the Thomistic concept of natural law

93 Westerman, *The Disintegration of Natural Law Theory*, 112–14 and 126–9.

94 Francisco Suarez, 'A Treatise On Laws and God the Lawgiver', in id. *Selections From Three Works of Francisco Suarez, S.J. Volume Two: The Translation*, with Introduction by James Brown Scott (New York: Oceana Publications, 1962), 3–646 at 30.

95 Ibid. 278.

96 Ibid. 30. Part of the problem here is arriving at a truly adequate definition of Thomistic *ius*.

The word has given rise to confusion. Like *droit*, *Recht*, *diritto*, etc., *ius* has two aspects: viz., that of a regulative *norm*, and that of a *faculty* to a claim. Today, the first is called 'objective' and the latter 'subjective' *ius*. In English we have two different words for these two aspects: *ius* as norm is 'law'; as a faculty it is 'right'. Confusion arises when the subjective term 'right' is used to translate *ius*, *droit*, *Recht*, in the objective set of 'law'. St. Thomas seldom uses *ius* in its subjective sense.

Dino Bigongiari (ed.), *The Political Ideas of St. Thomas Aquinas: Selected Representations* (New York: Hafner Press, 1953), 212.

97 Suarez, 'A Treatise on Laws and God the Lawgiver', 278.

98 Ibid. 279.

can be said to be effectively translated into the language of subjective rights':⁹⁹ the transposition of the metaphysical 'problem of Universals' into the realm of communal versus 'private' property rights. In this way, the Late Scholastics are able to formulate a prototypical theory of *mare liberum* predicated upon usufruct alone.

In the law of nations (*ius gentium*) a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker... Therefore, if gold in the ground or pearls in the sea or anything else in the rivers *has not been appropriated, they will belong by the law of nations to the first taker, just like the little fishes of the sea*.¹⁰⁰

Furthermore, the grounding of *ius* directly upon *usus et fructus* also establishes the framework for a rudimentary theory of *res nullius*, something taken up with élan by Grotius later on.¹⁰¹

V Divisible Sovereignty and Global Governance

The critical discursive stratagem of Dutch hegemonic transition lies with Grotius' remarkable re-working of the fundamental categories of early modern Property Law. 'In executing his ideological aim [i.e. legitimating Dutch hegemony], Grotius... brings about a major simplification of the concept of property. Property is now confined to private property, in the sense of an exclusive right, and it presupposes actual possession.'¹⁰² There is a close correlation between Grotian property doctrine and the Thomist neo-Realism of Conciliarism; Grotius appears to be closely following the reasoning of the fourteenth-century jurist Bartolus when he declared that 'all philosophers and canonists [believe] that the whole does not differ really [*realiter*] from the parts.'¹⁰³ Both Bartolus and Grotius rely heavily upon the quasi-Nominalist dimensions of (divisible) corporation theory. The critical factor at work here is the historical nexus between the textual production of *De Indis* and the concomitant incorporation of the VOC. The 'Divisible Sovereignty' of 'Public' State and 'Private' Company—both equally and fully subject to

99 Tully, *A Discourse on Property*, 68.

100 Francisco de Vitoria, 'On the American Indians', in id. *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 231–92 at 280. Emphasis added. It is significant that the Late Scholastics repeatedly read *mare liberum* 'down' from the more ontologically weighty *ius* of freedom of movement, or *ius peregrinandi*; see Anthony Pagden and Jeremy Lawrence, 'Introduction', in Vitoria, *Political Writings* (Cambridge: Cambridge University Press, 1991), xiii–xxvii at xxvi. See below, Chapter Eight.

101 See below, this chapter.

102 Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 70.

103 Berman, *Law and Revolution*, 607–8; Tierney, *Foundations of the Conciliar Theory*, 101–2.

the textual strategy of iterability—is expressed through *De Indis* via a systematic inversion of ‘public’ versus ‘private’ property rights; ‘Nations in their relation to the whole of mankind occupy the position of private individuals... Public property [is] the property of a given nation.’¹⁰⁴

Divisible Sovereignty,¹⁰⁵ in turn, operates within the parameters of an even wider discursive stratagem, also binary in nature: not only does *De Indis* strive to negate the legitimacy of the Papal Donation of *imperium*, it also positively affirms the communitarian-derived right of the VOC to trade and to navigate.

Freedom of trade [*liberum commercium*]... springs from the primary law of nations [*ius gentium secundarium*], which has a natural and permanent cause [*ius gentium primum*], so that it cannot be abrogated. Moreover, even if its abrogation were possible, such a result could be achieved only with the consent of all nations. Accordingly, it is not remotely conceivable that one nation may justly impose any hindrance whatsoever upon two other nations that wish to enter into a contract with each other... Therefore, if the Portuguese do not possess any right that gives them an exclusive privilege of trade with the East Indians, that right must have arisen, after the fashion of other servitudes, from an express grant, or from a tacit concession (that is to say, from prescription); for under no other circumstance could it exist. But no one made such an express grant, unless perchance the Pope did so; and he was not properly empowered to act thus.¹⁰⁶

Herein lies the first of several critical nexuses between the Grotian Heritage and the preliminary development of European Colonialism, the juro-discursive structure of the Text operating in synchronic fashion with the institutional innovations of Jan Company. This point is *critical*: the Luso-Dutch struggle has to be understood as a form of interstate rivalry *particular* to the contours of an emergent Capitalist World-Economy. The two warring parties were not merely rival nations, but fundamentally incompatible forms of political economies, each relying upon incommensurable modes of proprietary regimes: *imperium* contra

104 Grotius, *De Indis*, 237 and 236.

105 Peter Borschberg, ‘Critical Introduction’, in Hugo Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, ed. Peter Borschberg (New York: Peter Lang, 1994), 15–199 at 115–35. See also, Richard K. Ashley, ‘Untying the Sovereign State: A Double Reading of the Anarchy Problematique’, *Millennium*, 17 (1988), 227–62, *passim*. For all of its affiliations with deconstructive International Relations Theory, Divisible Sovereignty is an extremely well established doctrinal innovation, lasting well into the 19th century. As late as 1864, Henry Sumner Maine wrote:

Sovereignty is a term which, in international law, indicates a well-ascertained assemblage of separate powers and privileges... there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor and some with another. Sovereignty has always been regarded as divisible.

Cited in Keene, *Beyond the Anarchical Society*, 77.

106 Grotius, *De Indis*, 257.

dominium.¹⁰⁷ The Grotian Heritage represents not only the globalist triumph of the Netherlands, but also the successful hegemonic domination of the World-Economy by an early Capitalist model of geo-political governance, which may be labelled 'Corporate Sovereignty'

VI Corporate Sovereignty

The dichotomy between Politics and Economics is widely accepted as a primary signifier of Modernity.¹⁰⁸ This is, of course, a continuation of the seminal private/public dichotomy that is central to both international and domestic law.¹⁰⁹ There is a very precise correlation between the private and public distinction within International Law and the historical genesis of the Capitalist World-Economy; the discursive separation of the private from the public as an autonomous legal realm effectively renders the World-Economy both a-political and extra-judicial, superseding the direct regulatory and legislative capacities of the 'public', or 'political', Nation-State.¹¹⁰ For Cutler, 'the rules of private international trade law and the law of merchant order [*lex mercatoria*] are so foundational to the global political economy that they may be usefully regarded as both a constitutive element of global capitalism and an attribute of the capitalist order.'¹¹¹ In similar fashion, Strange's concept of structural power¹¹² underlines the similitude between the two spheres; in institutional terms, between Nation-States and Corporations. Power

107 In this sense, questions concerning the economic inefficiency of the *Estado da India* relative to the VOC are of secondary importance. Even if the Portuguese Empire was profitable, the issue of juridical incommensurability between the trade networks within the World-Economy remains. See Sanjay Subrahmanyam and Luis Filipe F.R. Thomaz, 'The Evolution of Empire: The Portuguese in the Indian Ocean During the Sixteenth Century', in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 298–331, *passim*.

108 Karl Burch, *'Property' and the Making of the International System* (London: Lynne Rienner Publishers, 1998), 1; Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (New York: Verso, 1994), 3, 121–2 and 125–58; Manuel Castells, *The Power of Identity* (vol. ii of *The Information Age: Economy, Society and Culture*) (Oxford: Blackwell Publishers, 1997), 213–308; Susan Strange, *States and Markets*, 2nd edn. (New York: Pinter Publishers, 1994), 34–9.

109 A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003), 33–59.

110 Ibid. 1–15 and 241–62.

111 Ibid. 35.

112 Strange, *States and Markets*, 24–5:

The power to determine the structure of the global political economy within which other states, their political institutions, their economic enterprises have to operate... structural power, in short, confers the power to decide how things shall be done, the power to shape frameworks within which states relate to each other, relate to people, or relate to corporate enterprises.

'is to be gauged by *influence over outcome* rather than mere possession of capabilities or control over institutions.'¹¹³ As we have already argued in Chapter One, this extra-judicial control over outcomes, coupled with the radical de-centralisation of political authority consistent with contemporary neo-Liberalism, is the defining element of governance. The macro-level domain of international public order duplicates precisely the juridical logic of micro-level national jurisdiction. 'The distinction between private and public international law is not reflective of an organic, natural or inevitable separation, but is an analytical construct that evolved with the emergence of the bourgeois state',¹¹⁴ accordingly, trans-national corporations (TNCs) are 'under-theorised while the state is over-theorised',¹¹⁵ By refusing to taxonomically classify and, therefore, problematize, the TNC as not merely an object but a subject of Public International Law due to its merely 'private' nature, mainstream international legal theory is able to effectively blind itself to the causal agency exerted within the formation of international jurisprudence by both Capitalism and its progenitor within the Modern World-System, Colonialism.¹¹⁶ Within contemporary global governance, the emergence of 'informal' (i.e. non-treaty), extra-judicial forms of authority is best exemplified in governmental networks of international financial regulation, most notably trans-governmental regulatory organizations (TROs) and 'Memoranda of Understanding' (MOUs).¹¹⁷ If both governance and authority operate to undermine the presumed distinction between public/private and political/economic,¹¹⁸ then it becomes logically possible to taxonomically re-formulate authority as 'legitimised power',¹¹⁹ no longer

113 Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996), 53. Emphasis added.

114 Cutler, *Private Power and Global Authority*, 35. See also, *ibid.* 36–9.

115 *Ibid.* 255.

116 For an outstanding discussion of the various manners in which informal control over legal formation by private entities may be exercised through the indirect manipulation of formal, or 'public', juro-political processes, see *ibid.* 180–240, *passim*.

117 Ann-Marie Slaughter, 'Governing the Global Economy through Government Networks', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 177–206 at 179. See Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', *European Journal of International Law*, 8/3 (1997), 435–48, *passim*.

118 'International economic relations are shaped by law and power, with power being able to take the form of politics, economic power, or force.' Brigitte Stern, 'How to Regulate Globalization?', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 247–68 at 250.

119 Rodney Bruce Hall and Thomas J. Biersteker, 'The Emergence of Private Authority in the International System', in *id.* (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 3–22 at 3.

exclusively identified with state-centrism.¹²⁰ If authority constitutes 'behavioural consent to routines, norms, and public declarations of recognition—that is, external manifestations of the internalisation of legitimacy—then it necessarily follows that 'to the extent that a state accepts some international rule or body as legitimate, that rule or body becomes authority'.¹²¹

The contemporary re-emergence of the multi-national corporation as an agency of global governance forms a central component of the fourth US-led hegemonic cycle of systemic accumulation, one that constitutes a remarkable 'double movement' to the second Dutch cycle.¹²² The hegemonic cycles of both the US and Holland is directly based upon an un-categorical repudiation territorialism with a concomitant affirmation and enforcement of national self-determination¹²³ and the freedom of trade.¹²⁴ The defining characteristics of the modern corporation, all of which emerged during the Dutch cycle, include: limited liability for in-

120 'Authority does not necessarily have to be associated with government institutions.' R.B. Friedman, 'On the Concept of Authority in Political Philosophy,' in Joseph Raz (ed.), *Authority*, (New York: New York University Press, 1990), 56–91 at 64.

121 Ian Hurd, 'Legitimacy and Authority in International Politics,' *International Organization*, 53/2 (1999), 379–408 at 381. The authority of non-state actors is ultimately dependent upon their performance of the 'role of authorship over some important issue or domain.' Hall and Biersteker, 'The Emergence of Private Authority in the International System', 4.

122 Giovanni Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (London: Verso, 1994), 70:

Just as the expansion and supersession of the Westphalian system under British hegemony was based on strategies and structures of world-scale rule and accumulation which were more like those of Imperial Spain in the sixteenth century than those of Dutch hegemony, so the expansion and supersession of that same system under US hegemony has involved a 'regression' towards strategies and structures of world-scale rule and accumulation which resemble more closely those of the Dutch than those of British hegemony.

For the centrality of corporations to the Dutch penetration and subsequent regulation of the Capitalist World-Economy, see Claudia Schnurmann, "'Wherever profit leads us, to every sea and shore...': the VOC, the WIC, and Dutch Methods of Globalisation in the Seventeenth Century," *Renaissance Studies*, 17/3 (2003), 474–93, *passim*.

123 Following the American War of Independence it was the case that the UK 'did lead the states that emerged out of the American wave of national self-determination towards a free trade world order.' However, 'that order was based on the full realization of Britain's 'imperialist' dispositions in Asia and Africa. By abandoning Britain's imperial developmental path in favour of strictly domestic territorialism, the United States reproduced on an incomparably larger scale the national developmental path of Dutch hegemony.' Arrighi, *The Long Twentieth Century*, 70–1. A vital difference between the Iberian and British cycles that Arrighi fails to note is that, unlike Spain, the UK never attempted territorialist imperialism within the lines of amity; instead, territorialism was restricted to the spaces of the colonial difference.

124 'The free trade ideologized and practised by the US government throughout the period of its hegemonic ascendancy has been... a strategy of bilateral and multilateral

vestors, free transferability of investor interests, legal personality and centralised management.¹²⁵ Although some of these characteristics were present to a certain extent in the fourteenth-century Genoise *societas comperarum* of the first cycle,¹²⁶ the first wholly cognisable modern limited liability public company was the VOC.¹²⁷ The organisational structures and corporate practices of the VOC were closely paralleled by the English East India Company¹²⁸ and served as the direct model for all of the later mercantile trading companies of the second cycle, including those of Italy,¹²⁹ France,¹³⁰ Portugal,¹³¹ Denmark,¹³² and Brandenburg-

intergovernmental negotiations of trade liberalisation, aimed primarily at opening other states to US commodities and enterprises' Ibid. 71.

- 125 Guido A. Ferrarini, 'Origins of Limited Liability Companies and Company Law Modernisation in Italy', in Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 187–215 at 189–90.
- 126 Ibid. 192–5. See above, Chapter Three.
- 127 Ella Gepken-Jager, 'Verenigde Oost-Indische Compagnie (VOC): The Dutch East India Company', in Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 41–81 at 41–2.
- 128 Ron Harris, 'The English East India Company and the History of Company Law', Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 217–47 at 219–47. The only major difference between the Dutch and English companies was that the latter was both more centralised and less oligarchic than the VOC, 'as all members [of the East India Company] had an equal vote in a meaningful General Court.' Ibid. 229. The corporate structure of the VOC closely paralleled the constitutional arrangements of the Dutch Republic. Gepken-Jager, 'Verenigde Oost-Indische Compagnie (VOC)', 45–6. See below, Chapter Five.
- 129 Ferrarini, 'Origins of Limited Liability Companies and Company Law Modernisation in Italy', 195–200.
- 130 Pierre-Henri Conac, 'The French and Dutch East India Companies in Comparative Legal Perspective', in Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 131–57 at 133–47. The fatal weakness of the various French trading companies was that it proved impossible to reconcile the highly capitalistic nature of the VOC model with the Absolutist political structure of the French State. 'Because the State was a major shareholder and the Company was to serve its ambitions, it never worked as if it was the property of its shareholders.' Ibid. 147.
- 131 Jose Engrácia Antunes and Nuno Pinheiro Torres, 'The Portuguese East India Company (1628–1633)', in Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 159–85 at 166, 181–2, 183 and 185.
- 132 Karsten Engsig Sørensen, 'The Danish East India Company', in Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 107–30 at 109–10, 113, 114 and 130.

Prussia.¹³³ In a similar fashion, trans-national corporations have proven themselves a critical institutional innovation of US free trade hegemony as private enterprise coupled with vertical integration allows for a successful internalisation of trade costs on a truly global scale.¹³⁴ This yields an unparalleled expansion of foreign direct investment (FDI) and privatised ownership throughout the World-Economy, further deepening and intensifying its hyper-capitalistic nature. As Gilpin has noted, the basis of US corporate FDI has been the 'shift of managerial control over substantial sectors of foreign economies to American nationals. In character, therefore, these direct investors in other countries are more similar to the trading companies of the mercantilistic era than to the free traders and finance capitalists that dominated Britain in the nineteenth century.'¹³⁵

A signature characteristic of the 'post-modern' Capitalist World-Economy of the fourth cycle of systemic accumulation, therefore, is an evolutionary replacement of the territorialist model of the Nation-State as 'space-of-place' with the rival model of 'space-of-flows'. Within the most radical view of Corporate Sovereignty, the *telos* of the State is to serve as the juro-political locus of the formation and investiture with legal personality of the multi-national corporate structure.¹³⁶ The US cycle, in its own temporally governed double movement, replicates many of the vital features of the trans-national private international law, or *lex mercatoria*, of the 'long' 16th century.¹³⁷ Premised upon a 'dualistic system of regulation',¹³⁸ the *ius commune* of the early international mercantile community provided for an autonomous and extra-territorial private dispute settlement system

133 Christoph Bergfeld, 'Trade Companies in Brandenburg,' in Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 249–61, *passim*.

134 'Trading companies were a response to the structure of the market.' Ann M. Carlos, and Stephen Nicholas, 'Theory and History: Seventeenth-Century Joint-Stock Chartered Trading Companies,' *Journal of Economic History*, 56/4 (1996), 916–24 at 919. Although the incorporation of the English East India Company preceded that of the VOC by two years, the corporation based Dutch model of 'financial revolution,' enabled Holland to create an efficient secondary market in public debt almost one hundred years before the English. Oscar Gelderblom and Joost Jonker, 'Completing a Financial Revolution: The Finance of the Dutch East India Trade and the Rise of the Amsterdam Capital Market, 1595–1612,' *Journal of Economic History*, 64/3 (2004), 641–72 at 663–7.

135 Robert Gilpin, *U.S Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment* (New York: Basic Books, 1975), 11.

136 'In the space-of-places [Capitalism] triumphed by becoming identified with particular states. In the space-of-flows, in contrast, [Capitalism] triumphed by *not* becoming identified with any particular state but by constructing world-encompassing, non-territorial business organizations.' Arrighi, *The Long Twentieth Century*, 84.

137 Saskia Sassen, *Territory/Authority/ Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006), 148–84.

138 Cutler, *Private Power and Global Authority*, 108–40.

grounded upon Natural Law (*pacta sunt servanda*; equity; the ‘just price’).¹³⁹ The dual sources for the ‘law merchant’ was both the customary law of *lex mercatoria* and the ‘thick’ ontology of ecclesiastical and canonical law.¹⁴⁰ Important to note here is the historically and juridically necessary connection between an extra-territorial regime of governance and Natural Law; *ius naturale* could be the only source for an effectively self-grounding system of *lex mercatoria* as the private merchant court system regulating long-distance trade practically superseded both the judicial authority and the institutional machinery of the positively constituted territorial unit. During the British cycle, *lex mercatoria* was progressively integrated into the various positivist national legal systems, consistent with the mercantilist notion of unified national economic policy as a necessary attribute of ‘state-building’.¹⁴¹ Finally, with the emergence of the US cycle and the rise of ‘Globalisation’¹⁴²—specifically, the trans-national replication of neo-Liberalism across national boundaries¹⁴³—we witness the (partial) re-emergence of a ‘dualistic system of regulation’.¹⁴⁴ Globalisation¹⁴⁵ as the medium of space-of-flows has encouraged a series of innovations in corporate structures that strongly parallel the evolution of public institutions, yielding the establishment of Corporate Sovereignty. In Chapter One I have already identified this trend as central to the contemporary simultaneous emergence of multi-lateralism and neo-Liberalism. These new forms of trans-national business cooperation,¹⁴⁶ along ascend-

139 Ibid. 108–9, 110–11 and 133–41.

140 Ibid. 116–25. As Holton has remarked, it is to non-feudal institutions such as the law merchant ‘that one must turn in order to locate many of the most significant aspects of the emergence of capitalism.’ R.J. Holton, *The Transition from Feudalism to Capitalism* (New York: St. Martin’s Press, 1985), 28.

141 Cutler, *Private Power and Global Authority*, 141–79. For a further discussion of the doctrinal subtleties of mercantilism, see below, Chapter Eight.

142 For Cutler, Globalisation

is blurring the distinction between public and private authority because states in their public capacities are negotiating laws that govern commercial transactions which have traditionally been regarded as private by liberal theories of international political economy and of international law, while private actors are increasingly participating in the settlement of matters that were previously regarded as part of the public domain.

Ibid. 185.

143 Ibid. 182.

144 Sassen, *Territory/Authority/Rights*, 184–203.

145 Defined by Wyn Grant as a ‘process in which transactions across borders of nation-states increase in importance relative to those within nation-states; and, whereby national boundaries cease to be a significant impediment to the movement of goods and services.’ Cited in A. Claire Cutler, ‘Private Authority in International Trade Relations: The Case of Maritime Transport’, in A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999), 283–330 at 298.

146 Co-operation ‘requires that the actions of separate individuals or organizations—which are not in pre-existing harmony—be brought into conformity with one

ing lines of institutionalisation, include informal industry norms and practices; coordination service firms; production alliances;¹⁴⁷ cartels; business associations; and, most importantly, private international regimes.¹⁴⁸ These regimes¹⁴⁹ act as private counterparts to trans-governmental regulatory organizations and networks, forming an 'integrated complex of formal and informal institutions that is a source of governance for an economic issue arena as a whole.'¹⁵⁰ Identified by Cutler as synonymous with both international private law and commercial arbitration,¹⁵¹ private international regimes exert governance over the internet,¹⁵²

another through policy coordination.' Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder, CO: Westview Press, 1989), 4–5.

- 147 Alternatively de-noted as 'strategic alliances'. Stephen J. Kobrin, 'Economic Governance in an Electronically Networked Global Economy', in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 43–75 at 49–50. See Lynn Mytelka and Michel Delapierre, 'Strategic Partnerships, Knowledge-Based Networked Oligopolies, and the State', in A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999), 129–49, *passim*.
- 148 Or 'institutional market authority'. Hall and Biersteker, 'The Emergence of Private Authority in the International System', 19. Also known as 'network oligopolies'. Kobrin, 'Economic Governance in an Electronically Networked Global Economy', 52–5.
- 149 Regimes are defined as 'principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area.' Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in id. (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983), 1–22 at 2. Regimes do not have to be state-centric either in membership or function. 'One of the most important analytical goals in studying private international regimes is to understand the degree to which the private actors in a regime are independent of the public ones.' Cutler, 'Private Authority in International Trade Relations', 14.
- 150 Ibid. 13.
- 151 A. Claire Cutler, 'Private Individual Regimes and Interfirm Cooperation', in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 23–40 at 30–1. See A. Claire Cutler, 'Locating Authority in the Global Political Economy', *International Studies Quarterly*, 43 (1999), 59–81, *passim*.
- 152 Kobrin, 'Economic Governance in an Electronically Networked Global Economy', 50–2; Debora L. Spar, 'Lost in (Cyber)space: The Private Rules of Online Commerce', in A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999), 31–51, *passim*.

the international minerals industry,¹⁵³ industrial production standards setting,¹⁵⁴ intellectual property,¹⁵⁵ the international maritime transport industry,¹⁵⁶ FDI,¹⁵⁷ and international capital markets.¹⁵⁸ The two most critical legal shifts here linking all of these trends are an increased preference by States to rely upon 'soft' law rather than 'hard' law as the primary means of unifying national trade and economic policies,¹⁵⁹ and the State-sponsored re-emergence of an international private dispute settlement regime of binding arbitration.¹⁶⁰

Sassen has persuasively argued that the practical requirements of the international economy necessitate the State's voluntary withdrawal from certain key domains of economic regulation conventionally understood as being of central importance to the integrity of public government.¹⁶¹ The global economy, while operating internationally, remains located—or 'embedded'—territorially, existing within national and municipal entities.¹⁶² The manifold convergences between national and international markets leads to a strategic series of juridical, administrative, and organisational 're-assemblages' within States, resulting in parallel convergences between exogenous and endogenous transformations¹⁶³ and yielding

the emergence of a strategic field of operations that represents a partial dis-embedding of specific state operations from the broader institutional world of the state that had been geared exclusively to national agendas... Globalisation is partly endogenous to the

153 Michael C. Webb, 'Private and Public Management of International Mineral Markets,' in A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999), 53-95, *passim*.

154 Liora Salter, 'The Standards Regimes for Communication and Information Technologies,' A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999), 97-127, *passim*.

155 Susan K. Sell, 'Multinational Corporations as Agents of Change: the Globalization of Intellectual Property Rights,' in A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999), 169-97, *passim*.

156 Cutler, 'Private Authority in International Trade Relations,' *passim*.

157 Saskia Sassen, 'The State and Globalization' in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 91-110, *passim*.

158 Ibid.

159 Cutler, *Private Power and Public Authority*, 205-25.

160 Ibid. 225-36.

161 Sassen, 'The State and Globalization,' 91.

162 Ibid. 103.

163 Sassen, *Territory/Authority/Rights*, 1-23 and 401-23.

national, and in this regard produced through a dynamic of denationalising what had been constructed as the national.¹⁶⁴

States deliberately creates internal zones of private authority within their national space for the deliberate purpose of facilitating corporate governance of international market transactions.¹⁶⁵ 'The result is a mix of new or strengthened forms of private authority and partly denationalised state authority, such as the instituting of private interests into state normativity'; the effects of Globalisation are not 'on the territory as such but on the institutional encasements of the geographic fact of national territory'.¹⁶⁶ While sovereignty has traditionally been exclusively identified with territoriality, this 'condition of systematically shared sovereignty'¹⁶⁷ serves as the necessary precondition for the emergence of Corporate Sovereignty, the systemic legitimization of private authority within global governance.¹⁶⁸

The emerging forms of governance of international markets and other major economic processes involve governments in a new role: states come less to function as 'sovereign' and more as components of an international 'polity'. The central functions of the nation-state will become those of *providing legitimacy for and ensuring the compatibility of supranational and subnational governance mechanisms*.¹⁶⁹

164 Sassen, 'The State and Globalization', 106.

165 'The restructuring of global production and power appear to have begun to transform the basis of political authority, legitimacy and accountability away from the national towards the trans-national and global levels, whilst simultaneously the internal aspects of accountability and authority are being reconfigured.' Stephen Gill, 'Globalisation, Market Civilisation, and Disciplinary Neoliberalism', *Millennium*, 24/3 (1995), 399–423, *passim*.

166 Sassen, 'The State and Globalization', 103 and 106. See also, Sassen, *Territory/ Authority/ Rights*, 222–321, *passim*.

What we see today is a sharp increase in the work of establishing convergence [between States]... The new geography of global economic processes and the strategic spaces for economic globalisation [has] to be reproduced, both in terms of the practices of corporate actors and the requisite technical and institutional infrastructure... as well as in terms of the work of the state in producing or legitimating new legal regimes. This signals a necessary participation by the state, including in the regulation of its own withdrawal.

Ibid. 236 and 269.

167 Castells, *The Power of Identity*, 307.

168 Alain Joxe, *Empire of Disorder* (Cambridge: Semiotext(e), 2002), 71–2, 81, 84–7, 104–9 and 199–201; James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990), 36, 92, 264, 273, 274, 294 and 357.

169 Paul Hirst and Grahame Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance*, 2nd edn. (Cambridge: Polity Press, 2000), 171. Emphasis added.

The net result is a new 'paradigm that neither circumvents nor negates the state-centric model but posits sovereignty-bound and sovereignty-free actors as inhabitants of separate worlds that interact in such a way as to make their coexistence possible.'¹⁷⁰ In a manner directly reminiscent of Mignolo's notion of border thinking,¹⁷¹ Sassen has conceptualised the 'de-nationalised' transformation of the contemporary Capitalist World-Economy in terms of an 'analytic borderlands'¹⁷² in which the two separate domains of domestic and international space 'present themselves as radically different spatio-temporal orders.'¹⁷³ Herein

the specificity of the global does not necessarily reside in being mutually exclusive with the national. The strategic spaces where many global processes are embedded are often national; the mechanisms through which new legal forms, necessary for globalisation, are implemented are often part of state institutions. The infrastructure that enables the hyper-mobility of financial capital at the global scale is embedded in various national territories.¹⁷⁴

In parallel fashion to Arrighi's double movement between the second and fourth cycles of systemic accumulation, the neo-Liberal, digitalised,¹⁷⁵ de-regulated, and privatised global economy replicates many of the foundational characteristics of the private law merchant. 'What is new is the scale and power of [this] intermediate economy; we can think of the parallel with medieval traders: trading was not new, but they built a whole new model of accumulation through their practices—merchant capital.'¹⁷⁶

VII Corporate Sovereignty and the Joint-Stock Companies

We may hypothesize that Corporate Sovereignty possesses two aspects, *de iure* and *de facto*. As of Law, every private authority is fully subject to legal incorporation by the State, and territorially grounded in the exercise of its conveyed governance capacities.¹⁷⁷ As of fact, private actors exercise decisive structural power over national politics and economics. The outcome is a radical iterability between public and private 'sovereignty', both sectors perpetually interfering in the 'inter-

170 Rosenau, *Turbulence in World Politics*, 273.

171 See above, Chapter Two.

172 Sassen, *Territory/Authority/Rights*, 378–98.

173 Ibid. 393 fn. 5.

174 Ibid. 381.

175 Ibid. 325–77.

176 Ibid. 391.

177 Multinational Economic Enterprises (MNEs) are 'national firms with a clear centre or home country, which engage in international operations and require access to territory to function... MNEs are international or cross border entities which *are* of the existing interstate system and are firmly rooted in national jurisdiction.' Kobrin, 'Economic Governance in an Electronically Networked Global Economy', 46.

nal operations' of the other. On one level, there is a net increase in State power; effective private governance of the global economy improves national production and economic efficiency, yielding greater statist competitiveness within the interstate system. On the other, there is a concomitant net increase in the quanta of private power exercised at the expense of public authorities. This is most apparent in the rise of 'private protectionism', the coordinated 'intervention of firms with the operation of the free market' in order to create new regimes of trans-national oligopolies.¹⁷⁸ Evolving generations of TNCs are, therefore, able to exercise ever-greater authority and structural power.¹⁷⁹ It is precisely within this 'double movement' between the second and fourth cycles of systemic accumulation that the contemporary—or 'post-modern'—relevance of Grotius as the last of the primitive legal scholars may be situated.

In terms of Corporate Sovereignty, contemporary TNCs display a remarkable similarity to seventeenth-century joint-stock companies.¹⁸⁰ Although it would be anachronistic to attribute to Grotius a developed theory of international corporate personality, as the notion of international legal personality was first developed by Gottfried Wilhelm Leibniz (1646–1716),¹⁸¹ the praxis of the joint-stock company within trans-national space is highly indicative of a sovereign personality. To the extent that Grotius displayed a notion of corporate personality within *De Indis*, it would seem to correspond to an early, or 'primitive', formulation of 'corporate realism', in which the corporate body

originates from its real existence and is not created by the process of incorporation. A corporate body does not owe its personality to state recognition. This legal personality is in no sense artificial or fictitious, but is as real and natural as the personality of a human being; its will is the will of the group. As a consequence, all entities with real personality would have legal personality.¹⁸²

The vital point is that the corporate body is both the subject and the object of *ius naturale*. Equally subject to the logic of iterability, the early modern trading com-

178 Strange, *The Retreat of the State*, 147–60.

179 Alan M. Rugman and Alain Verbeke, 'Multinational Enterprise and National Economic Policy', in Peter J. Buckley and Mark Casson (eds), *Multinational Corporations in the World Economy: Essays in Honour of John Dunning* (Vermont: Edward Elgar, 1992), 194–211, *passim*.

180 Arrighi, *The Long Twentieth Century*, 72–4, 80–4 and 318–19.

181 Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: T.M.C. Asser Press, 2004), 29–84.

182 Daniel Zimmer, 'Legal Personality', Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer: Kluwer Legal Publishers, 2005), 265–80 at 268. The issue of corporate personality and Natural Law will be re-visited throughout all of the remaining chapters.

pany was from its inception a 'quasi-public institution',¹⁸³ generating reciprocal benefits for both the private and public domains.¹⁸⁴ The State enjoyed a dramatic increase in the national supply of available credit,¹⁸⁵ the corresponding expansion of national production capacity, and the sustainable private subsidization (re. cost-efficiency) of critical 'state-building enterprises', such as exploration, long-distance trade, and colonization. The companies exploited the legalization—that is, the legitimation—of new forms of mobile property rights (credit, interest, financial assets), and the establishment of new 'institutional-legal' regimes of commercial and economic *ius*.¹⁸⁶ Consistent with Divisible Sovereignty, the 'Realist' theory of the Corporation established the Company as the bearer of enforceable natural rights,¹⁸⁷ including the policing of trade monopolies, the administration of colonial territories, the construction and manning of fortifications, the possession and maintenance of 'private' military forces, the formation of treaties, and, perhaps most important, the declaration of lawful warfare.¹⁸⁸

- 183 Burch, *'Property' and the Making of the International System*, 118. 'In every instance European ventures on the oceans were sustained by a combination of public, quasi-public, and relentlessly private enterprise.' William H. McNeill, *The Pursuit of Power: Technology, Armed Force, and Society Since A.D. 1000* (Chicago: University of Chicago Press, 1982), 103. See M.N. Pearson, 'Merchants and States,' in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 41–116 at 77–100; Holden Furber, *Rival Empires of Trade in the Orient 1600–1800* (Minneapolis: University of Minnesota Press, 1976), 185–229. The 'correct' mixture of public and private elements appears to have been a critical variable to the long-term economic and political success of the Corporation. See Pearson, 'Merchants and States,' *passim*.
- 184 Burch, *'Property' and the Making of the International System*, 119.
- 185 See Strange, *States and Markets*, 30, on the under-appreciation of the supply and control of credit as a form of structural power. Kobrin has noted a striking similarity between joint-stock companies and MNEs in this regard: advanced technological research and development mandates the 'internationalisation' of the domestic market as the only viable means of achieving sustainable economies of scale. Kobrin, 'Economic Governance in an Electronically Networked Global Economy', 48–9, 50, 58 and 63.
- 186 Burch, *'Property' and the Making of the International System*, 111–13 and 132.
- 187 See F.W. Maitland, 'Translator's Introduction,' in Otto von Gierke, *Political Theories of the Middle Ages* (Cambridge: Cambridge University Press, 1900), vii–xlv, *passim*. 'Credit reaped its most stable, if not also the greatest rewards, in the service of capital.' Burch, *'Property' and the Making of the International System*, 113.
- 188 Marjolein't Hart, *The Making of the Bourgeois State: War, Politics and Finance During the Dutch Revolt* (Manchester: Manchester University Press, 1993), 23; C.H. Boxer, *The Dutch Seaborne Empire 1600–1800* (Harmondsworth: Penguin Books, 1965), 20, 24 and 26. 'The distinction between the company as a private body of enterprise and as a public authority enjoying more or less sovereign power was actually somewhat lost.' P.W. Klein, 'The Origins of Trading Companies,' in Leonard Blussé and Femme S. Gaastra (eds), *Companies and Trade* (Leiden: Leiden University Press, 1981), 17–28 at 23.

The transference of crucial property and political rights from State to Company served as the discursive template for the metaphysical inversion of the hierarchy of 'private' and 'public'; the legitimate investiture of a private legal personality with all of the necessary signs of 'quasi-government'.¹⁸⁹ As 'property was a judicial term before it was an economic one',¹⁹⁰ the joint-stock company constituted

A unique form of cooperation between merchant entrepreneurs and government interests. It became historically important, because it did not lead to the total subjection of mercantile interests to the whims of government, but rather to a balanced co-operation, in which the market forces repeatedly proved to be the strongest.¹⁹¹

The significance of the joint-stock company for the Modern World-System threatens to subvert our conventional understanding of 'Modernity', much of which is generically derived from the Weberian tradition. The 'pre-modern' mercantilistic trading company exemplifies the underlying iterability operating between the Corporation, traditionally defined as an 'imperatively co-ordinated corporate group' and the Nation-State, a specifically 'political' variant of the broader 'corporate group'. For Weber

An imperatively co-ordinated corporate group will be called political if and insofar as the enforcement [of] its order is carried out continually within a given *territorial* area by application and threat of physical force on the part of the administrative staff. A compulsory political association with continuous organization... will be called a 'state' if and insofar as its administrative staff [i.e. 'the government'] successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.¹⁹²

189 Burch, 'Property' and the Making of the International System, 129.

190 J.G.A. Pocock, *Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985), 56.

191 Neils Steensgaard, 'The Companies as a Specific Institution in the History of European Expansion', in Leonard Blussé and Femme S. Gaastra (eds), *Companies and Trade* (Leiden: Leiden University Press, 1981), 245-64 at 263. 'The rise of the joint-stock companies offers a historic microcosm of many neo-realist concerns with international relations and international political economy, including collective goods, regimes, hegemonic stability, and burgeoning norms.' Burch, 'Property' and the Making of the International System, 133.

It was the singular character of the VOC as a joint-stock company with its operational parameters of capital input and financial profit, and as an institution with authorities comparable to that of a state that made it use its powers more prudently and economically than any sovereign state in Europe.

Peter Kirsch, 'VOC – Trade Without Ethics?', in Karl Anton Sprengard, and Roderich Ptak (eds), *Maritime Asia: Profit Maximisation, Ethics and Trade Structure c. 1300–1800* (Wiesbaden: Harrasowitz Verlag, 1994), 189-202 at 202.

192 Max Weber, *The Theory of Economic and Social Organization*, ed. with Introduction by Talcott Parsons (New York: The Free Press, 1947), 154.

As is always the case with Weber, the successful monopolisation of a social violence that is wholly legitimate, or 'lawful', is the master-sign of the modern, or 'post-feudal', Nation-State; within the Weberian construction, the 'state' is in fact nothing other than 'an administrative legal order subject to which the organised corporate activity of the administrative staff, which is also regulated by legislation, is oriented'.¹⁹³ The logic of the dangerous supplement is clearly evidenced within Weber's own language, belied by the radically nominalistic nature of his taxonomic schema.¹⁹⁴ As Weber freely concedes, 'the use of physical force is neither the sole, nor even the most usual, method of administration of political corporate groups';¹⁹⁵ ergo, any group possessing a corporate structure that is capable of exerting a form of physical force that is accepted as either legitimate in its own terms, or merely 'lawful' as conveying the legitimacy of the empowering source, prospectively merits identification as a 'political association', or State. As violence is 'the method specific to political associations and always the last resort when others have failed'¹⁹⁶ and the 'claim of the modern state to monopolise the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization',¹⁹⁷ the jurisdictional and governance functions exercised by the joint-stock company render it taxonomically identical with the generic political association. From the perspective of Primitive Legal Scholarship, the pressing question now becomes on what lawful basis is the sovereignty of joint-stock company constituted: on the 'ascending' logic of Humanist (proto-) positivism or the 'descending' logic of Late Scholastic neo-Realism?

Corporatism and guild associationalism did not figure prominently within Humanist discourse, being almost wholly absent from the Italian Humanist tradition.¹⁹⁸ The reasons for this are not difficult to ascertain: Civic Humanism is thoroughly pro-Statist and generally favours the indivisible sovereignty of the unitary State. Constituting an early form of Legal Positivism, Humanism found it difficult to locate a statutory basis for divisible sovereignty; for the most part Roman law withheld recognition of the legal personality of subsidiary in the absence of an express grant, or 'concession', from the State.¹⁹⁹ The 'Aristotelian scholastics and the humanists, with a few significant exceptions, sided with the city or state and concentrated attention upon man as citizen.'²⁰⁰ As a result, corporate identity never formed part of civic *libertas*, political 'freedom' conceived of instead as the volun-

193 Ibid. 156.

194 For an extended discussion of Nominalism and the political iterability of the joint-stock company, see below, Chapter Seven.

195 Ibid. 154.

196 Ibid. 156.

197 Ibid.

198 Antony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (London: Methuen, 1984), 96–109.

199 Ibid. 16.

200 Ibid. 27.

tary actions of the civically engaged individual practising *virtu*.²⁰¹ In fact, the historical origin of the inherently unstable dichotomy between ‘private’ and ‘public’ is the distinction drawn by Roman jurists between *ius* and *lex*.²⁰² Corporatism, as it developed within the central medieval period, received its greatest intellectual support from Theology and the juridical application of Natural Law via the medium of ecclesiastical law.²⁰³ The Church’s adoption of civic corporatism was theological and political in equal measure. Christianity served as the normative basis of the associational ethos of fellowship (*genossenschaft*)²⁰⁴ and *communio*.²⁰⁵ The rise of the political category of secular ‘community’, or *universitatis*, was temporally and geographically concurrent with the spread of the Investiture Controversy,²⁰⁶ corporatism receiving its highest degree of papal endorsement from non other than the arch-papalist Innocent IV.²⁰⁷ Accordingly, the neo-Thomist Late Scholastics developed a strong juro-political interest in associationalism as an expression of subsidiary sovereignty.²⁰⁸ Most critical here was the Scholastic

201 Ibid. 107–8.

202 Cutler, *Private Power and Public Authority*, 43. Perry Anderson has identified this legal distinction as constituting a ‘double social movement’ of Antiquity, in which the ‘juridically unconditional character of private property consecrated by the one [*ius*] found its unconditional counterpart in the formally absolute nature of imperial sovereignty exercised by the other [*lex*].’ Cited in *ibid.* For a discussion of the difference between the objective and subjective nature of *ius*, see below, Chapter Six.

203 Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 19.

204 Otto von Gierke, *Community in Historical Perspective: A Translation of Selections from Das deutsche Genossenschaftsrecht (The German Law of Fellowship)*, ed. Antony Black (Cambridge: Cambridge University Press, 1990), 241–3.

205 Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 58–60 and 64–5. ‘The very terms *commune* and *communitas* were cognate with *communio*.’ *Ibid.* 64.

206 ‘The issue of imperially appointed aristocratic bishops was most sharply contested in the Rhineland and northern Italy; that is, precisely where communes were claiming the “liberty” of territorial immunity and conditional allegiance... “Liberty of the Churches” (*libertas ecclesiae*) and communal liberty were related parts of the same movement for corporate self-determination.’ *Ibid.* 63–4.

207 Innocent’s position on urban corporatism depended heavily upon a strict separation between secular *universitates* and ecclesiastical colleges; concerning the latter, Innocent was an unyielding monarchist. *Ibid.* 20–2. The Conciliarist Zarabella also insisted upon the customary legal right of communal incorporation. *Ibid.* 20.

208 *Ibid.* 76–80.

The scholastics... interpreted Aristotle’s doctrine of the *polis* as the product of nature, to mean that men have a general tendency to *communicatio*. In the moral sphere, they interpreted man’s political nature not as meaning that men, to be good, have to practice virtues in a public or civic context (as later humanists would have it), but as meaning

and Conciliarist²⁰⁹ Marsilius of Padua (1275/80–1342), the ‘only medieval thinker to take seriously the role played by the corporate organization in contemporary city-states.’²¹⁰ His seminal text *Defensor pacis* (1324) exhibits a thoroughly corporatist approach in two critical respects. Firstly, the guild value of *communio* was posited as the normative basis of moral and social order; ‘individual brethren, and in even greater degree groups and communities, are obliged to help one another, both from the feeling of heavenly love and from the bond or law of human society’ in order to realize the ‘fruits of peace or tranquillity.’²¹¹ Secondly, popular sovereignty is textually fore-grounded and institutionally secured through the organization of the secular community along the lines of guild-like *universitas civium*, ‘through its election or will expressed by words in the general assembly of the citizens.’²¹² A complex sets of associations are created, *universitas* signifying both

that the good life necessarily involves friendship, fraternity, and mutual aid. This was a reinterpretation of Aristotle in the light of Christian virtues.

Ibid. 78. Or, as I would have it, this ‘reinterpretation’ constituted a rhetorical migration from ontologically ‘thin’ *habitus* to ontologically ‘thick’ Divine Presence. On the general affinity between Late Scholasticism and Republicanism, see Quentin Skinner, *The Renaissance* (vol. i of *The Foundations of Modern Political Thought*) (Cambridge: Cambridge University Press, 1978), 49–65.

209 Marsilius of Padua, *The Defender of Peace: The Defensor Pacis*, trans. with Introduction by Alan Gewirth (New York: Harper & Row Publishers, 1956), 272–3.

210 Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 86 and 91–5.

211 Marsilius of Padua, *The Defender of Peace*, 4.

212 Ibid. 45. On the corporate integration of the political community, see Alan Gewirth, *Marsilius of Padua: The Defender of the Peace. Volume I: Marsilius of Padua and Medieval Political Philosophy* (New York: Columbia University Press, 1964), 76 and 180–1. Marsilius is an unparalleled example of a late medieval theorist who alternates between ‘ascending’ and ‘descending’ argumentation. Although Marsilius provides an apparently Positivist account of Law, he is careful to avoid the reduction of Justice to the political will of the State. Law, as enforced through ‘force’ (*violentia*; *potentia*) is rigorously separated from ‘power’ (*potestas*) that is derived from legitimacy or ‘authority’ (*auctoritas*). ‘In contexts in which rightfulness has to be distinguished from mere force, [Marsilius] uses *auctoritas* rather than *potestas*, e.g., where he is discussing the seat of legislative or governmental authority.’ Alan Gewirth, ‘Introduction’, in *ibid.* xix–xci at lxxxvii. Authority, in turns, flows directly from popular sovereignty, enshrined as *res publica*, that operates in accordance with the dictates of Natural Law;

It is, indeed, in the will of the people that Marsilius finds the equivalent of natural law in something corresponding to the traditional [Neo-Platonic] sense. Not only is the state itself based upon the ‘natural desire’ of all men for a sufficient life and their consequent ‘natural impulse’ to live in the state, but the desire of all or most men for good laws is itself guaranteed by the ‘nature’ to which human desire belongs.

Ibid. 151–2. Accordingly, Marsilius is able to hold, without contradiction, that:

And hence, too, some things are lawful according to human law which are not lawful according to divine law, and conversely. However, what is lawful and what unlawful in

the guild, or collegium in particular, and the commune, or polity more generally, investing subsidiary bodies with a residual element of corporate sovereignty,²¹³ the sign of inalienable legal personality being the corporations right to enforce its legal rights against the State.²¹⁴ The theological basis for corporatism was only strengthened with the outbreak of the Reformation, the German cities serving as the focus point of both Protestantism and corporate politics.²¹⁵ The centrality of

an absolute sense must be viewed according to divine law rather than human law, when these disagree in their commands, prohibitions or permissions.

Marsilius of Padua, *The Defender of Peace*, 191. In the event of a direct conflict between human and divine law, human law must give way; see also, *ibid.* 130, 133, 137 and 169. Marsilius' overriding concern is to subordinate ecclesiastical authority to the enforcement powers (*potestas*) of the secular order; *ibid.* 136–7. What concerns us is that the movement towards corporatism necessitates a parallel move toward Natural Law; the

common conception of the mind, that 'every whole is greater than its part'... is true with respect both to magnitude or mass and to practical virtue and action. From this it clearly follows of necessity that the whole body of citizens, or the weightier multitude thereof, which must be taken for the same thing, can better discern what must be elected and what rejected than any part of it taken separately.

Ibid. 51. Nederman has convincingly demonstrated that Marsilius' notion of 'popular sovereignty' rhetorically depends upon the relatively 'thick' naturalist ontology of Cicero. Cary J. Nederman, *Community and Consent: The Secular Political Theory of Marsiglio of Padua's Defensor Pacis* (Landham: Rowman & Littlefield Publishers: 1995), 38–48 and 73–98. For a decisive refutation of Marsilius as an 'early' Positivist, see Ewart Lewis, 'The "Positivism" of Marsiglio of Padua', *Speculum*, 38/4 (1963), 541–82, *passim*.

- 213 Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 49:

In Roman law *universitas* meant a private corporation such as the town (*municipium*) or guild (*collegium*); in the Middle Ages it was used as a generic term covering guilds, chapters, cities, kingdoms and the Empire itself... Thus the distinction between sovereign and non-sovereign corporate bodies was blurred. But although 'sovereignty' in the modern sense was not implied in the town's claim to be *universitas*, they did... regard themselves as self-contained bodies which already had within them the 'kernel' of public 'commonweal' and of the 'state'.

Marsilius of Padua was himself personally responsible for a concomitant 'blurring' in formal juro-political discourse when he held that 'the kingdom (*regnum*)' differs 'from the *civitas* [the city] in size only'. *Ibid.* 88. For Marsilius as a republican thinker, see Nicolai Rubinstein, 'Marsilius of Padua and Italian Political Thought of His Time', in J.R. Hale, J.R.L. Highfield and B. Smalley (eds), *Europe in the Late Middle Ages* (London: Faber & Faber, 1970), 44–75, *passim*.

- 214 Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 49–50.

- 215 *Ibid.* 110–20.

[The] Calvinist notion of the Church as a community founded by a covenant, a covenant to be explicitly renewed among believers, while based above all on biblical ideas the covenant between God and his people, was also in effect establishing as a theo-

corporatism to Reformation theo-political thought provoked diametrically opposed responses from the most prominent political theorists of the period. The anti-Calvinist Bodin ruthlessly subordinated the existence of all corporate bodies to the positive law of the Absolutist State.²¹⁶ The Calvinist Althusius, in deliberate contrast to Bodin, places a corporate sovereignty that is derived from a providential Natural Law at the centre of his federalist constitutionalism,²¹⁷ *communicatio* the highest expression of a specifically Christian notion of love grounded in Divine Being.²¹⁸ It is on these grounds that Gierke was able to identify the ultra-capitalistic joint-stock company as a form of 'fellowship'.²¹⁹ 'The capitalist nature of the whole is always in evidence; and, insofar as the entire organization refers back to the collectivity of the shareholders as its ultimate representative, the association is in fact manifested solely as organised capital.' However, it is 'the *organization* of the joint-stock company which, above all, makes it a fellowship.'²²⁰

Thus the very *existence* of a joint-stock company is by no means determined by the original capital sums alone, but in addition by a personal *collective will*. Collective will brings the corporation into existence by a constitutive act... and in the *articles*. Collective will gives [the company] its constitution, its law of existence; and, within the bounds of this constitution, it is a collective will [that] in the first instance controls any changes in, and the final dissolution of, the organism. Creative collective will manifests itself as the collective will of the *plurality*, and finds expression in civil autonomy; on the other hand, the collective will acting according to a constitution is the collective will of a *single* entity and sets *corporate* autonomy in motion; both, however, are capable of autonomous decision-making, creating objective right.²²¹

From Gierke's viewpoint, the joint-stock company is morphologically identical with the republican polity.²²²

logical principle a common social and constitutional practice of medieval guilds and towns.

Ibid. 114.

216 Ibid. 129–31. In one of his most controversial moves, Bodin asserts that the Estates-General of France possess no independent legislative or judicial authority. Bodin, *On Sovereignty*, 19 and 23–4.

217 Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 131–42.

218 In Althusius, 'Germanic Christianity achieved its truest and finest philosophical expression in social and political thought.' Ibid. 141.

219 Gierke, *Community in Historical Perspective*, 196–204.

220 Ibid. 199.

221 Ibid. 198–9.

222 'The joint-stock company has in every respect the legal status of a fellowship personality, possessing within the life-sphere prescribed for it constitutionally and limited by law, an independent capacity to do justice, to will and to act.' Ibid. 201.

From a more narrowly Grotian perspective, however, considerations of Corporate Sovereignty are resolved into issues of property, in particular the juro-political problems posed by the categories of *dominium* and *imperium*. Consistent with early modern jurisprudence, *De Indis* classifies *imperium* as *iurisdictio et protectio*,²²³ and *dominium* as *proprietas*.²²⁴ 'Dominium is property and imperium is sovereignty... limited to protection and jurisdiction, to be exerted... for the sake of safety for all.'²²⁵ This binary classification scheme is derived from Gentili's seminal work *De Iure Belli*: 'Things which are common to all so far as their use is concerned are the property of no one; their jurisdiction and protection belong to the sovereign.'²²⁶ The investment of certain proprietary forms of *ius* with the status of Natural Law in itself establishes the demarcation of lawful sovereignty; *imperium* prevails precisely wherein it may be exercised with legitimacy. Thus, a 'war will be called natural, if it is undertaken because of some privilege of nature which is denied us by man. For example, if a right of way is refused us, or if we are excluded from harbours, or kept from provisions, commerce, or trade.'²²⁷

The massive rhetorical conceit at the heart of *De Indis* lies within the Grotian iterability between public and private Personality.²²⁸ The investment of the joint-stock company with both *ius* and governance effects a parallel substitution of *dominium*, a proprietary regime, by a quasi-*imperium*, the 'privatised' exercise of public sovereignty as a legitimate exercise of 'natural' or Just War. *De Indis* taxonomically re-classifies the basic categories of naturalist jurisprudence as a means of legitimating the private authority and governance of the VOC within trans-national juro-political space, a 'primitive' form of Corporate Sovereignty, discursively legitimated by the *difference* between the proprietorial *dominium* of world-empire and jurisdictional *imperium* of the World-System.²²⁹

223 Grotius, *De Indis*, 237 and 245.

224 Ibid. 220, 226–7 and 228.

225 J.K. Oudendijk, *Status and Extent of Adjacent Waters: A Historical Orientation* (Leyden: A.W. Sijthoff, 1970), 27. See Masahara Yanagihara, 'Dominium and Imperium', in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 148 and 154. Also, Frans De Pauw, *Grotius and the Law of the Sea* (Brussels: Institut de Sociologie, Université de Bruxelles, 1965), 32.

226 Alberico Gentili, *De Iure Belli Libri Tres*, with Introduction by Coleman Phillipson (New York: Oceana Publications, 1964), 92.

227 Ibid. 86.

228 Keene, *Beyond the Anarchical Society*, 52:

The law of nations was not, in Grotius' scheme, exclusively a law for nations; for it included rights and duties, albeit limited ones, for individuals and private corporations. While he conceptualised the rights of public authorities in terms of their possession of marks of sovereignty, the main vehicle that Grotius used to think about the rights of private individuals and bodies was the concept of property ownership.

229 Intriguingly, English Merchant Companies also attempted a *sub rosa* conflation of *dominium* with *imperium*. David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 1995), 92–4. 'The problem of

VIII 'The State within the State': The VOC as Trans-National Legal Personality

Prima Facie, *De Indis* maintains the orthodox hierarchy between Public and Private by classifying the VOC—the private commercial body—as the metaphysical inferior of the Estates-General, the public political entity.

It is a generally accepted fact that the individuals who compose the East India Company are subject to the said Estates General. For all persons within the territory in question have pledged allegiance by oath to that assembly, or else tacitly give adequate assurance, by making themselves a part of the political community governed by the latter, of their intention to live in accordance with the customs of this community and to obey the magistrates recognized by it.²³⁰

What the Text elides, at precisely this juncture, is the social context of its own discursive production; because of the extreme oligarchic nature of the Dutch Republic, the Estates-General and the VOC constituted a unified *de facto* organizational entity. The political oligarchy and the Heeren XVII were 'one and the same, indistinguishable from each other and indeed often consisting of the same people. This was the reason for the apparent autonomy from metropolitan political control that the VOC enjoyed; because the VOC was identical with the state, this was really no abdication by the state.'²³¹ From the perspective of Critical Theory, *De Indis* is suffused by the logic of the dangerous supplement, rendering

uniting *dominium* with *imperium* would persist... as the fundamental and ultimately combustible dilemma at the core of British imperial ideology' Ibid. 94. The crucial difference with the Dutch, however, was that English publicists framed the problem in terms of Crown title, reflecting the gradual drift towards Stuart absolutism. Ibid. 104–5. The resolutely republican nature of the United Provinces and its doppelganger the VOC served to restrict Grotian discourse within the confines of Corporate Sovereignty.

230 Grotius, *De Indis*, p. 296.

231 Pearson, 'Merchants and States', 85–6. See Peter Burke, 'Republics of Merchants in Early Modern Europe', in Jean Baeckler, John A. Hall and Michel Morineau (eds), *Merchants, Companies and Trade: Europe and Asia in the Early Modern Era* (Cambridge: Cambridge University Press, 1999), 220–33, *passim*.

The mechanisms by which the Dutch merchant elite and political oligarchy together regulated internal competition within the Dutch entrepot, in the interests of the entrepot as a whole, and at the same time thwarted the successive challenges of the rivals of the Dutch in the quest for hegemony over world trade, were various and complex. But the common thread... was a unique and characteristically Dutch blend of political intervention and business efficiency. What it all amounted to was a harnessing of the Dutch entrepot to the machinery of the Dutch state. The Dutch business world of the seventeenth century was fundamentally shaped by an assortment of companies, national and local, consortia with political links, cartels and combinations.

Jonathan I. Israel, *The Dutch Primacy in World Trade* (Oxford: Oxford University Press, 1982), 16.

the metaphysical hierarchy between the 'political' and the 'economic' precarious. In this way, both theoretical and historical considerations operate in parallel manner to subvert the alleged discursive unity of the Text.

The 'alien' nature of *De Indis* replicates perfectly the anomalous status of the VOC, which lacks a precise correlative in twenty-first-century International Law and International Relations Theory. The VOC was itself an 'assemblage' of earlier and smaller trading and privateering 'firms', the *voorcompagnies*.²³² Lacking any of the cognisable features of either the earlier Guild or the regulatory company, the VOC focused exclusively on capital allocation, at the expense of share holding based on social estimations of status or professional expertise, unlike its contemporary the English East India Company. Restricting all policy-making decisions to the 'Gentlemen XVII', Jan Company reproduced in micro-miniature form the oligarchic constitutional structure of the United Provinces, the 'state within a state' being invested with virtually all of the characteristic attributes of original personality. As Steensgaard has persuasively argued, the joint-stock company evolved directly out of the exogamous non-commercial political necessities of securing a hegemonic 'coercion-intensive colonial trade', and not out of the endogenous structures of the domestic national market.

From the very moment of its amalgamation, the VOC possessed an inherently geo-strategic dimension, in accordance with the authorial intent of Holland's Advocate Oldenbarnevelt; years afterwards, he referred to 'the great East India company, with four years of hard work, *public and private*, I have helped establish in order to inflict damage on the Spaniards and the Portuguese.'²³³ A hegemonic Corporate Sovereign, the VOC was a pivotal instrument of Dutch success within the World-Economy, eschewing the territorialist model of the Iberian kingdoms.

As no new technique, unknown to the Portuguese, was at the disposal of the companies, it is a reasonable hypothesis that the companies, by virtue of their institutional structure, were able to do things outside of the reach of the Portuguese, or to do the same, but with more economical use of their resources; i.e., that they were institutional innovations. The VOC integrated the functions of a sovereign power with the functions of a business partnership. Political decisions and business decisions were made within the same hierarchy of company managers and officials, and failure or success was always in the last instance measured in terms of profit. By this means, the company as a business venture was able to internalise protection costs, and protection costs were added to the overheads that might be calculated rationally.²³⁴

232 Neils Steensgaard, *Carracks, Caravans and Companies: The Structural Crisis in the European-Asian Trade in the Early 17th Century* (Denmark: Studentlitteratur, 1973), 126–31.

233 Ibid. 128. Emphasis added.

234 Ibid. 237.

The spectre of 'instrumental rationality', in Weberian theory the master sign of the late feudal transition to modern capitalism, haunts the historical origins of Jan Company, clearly distinguishing it from its crown corporation Iberian rivals.

In 1602 the precompanies were joined together... by a charter issued by the Estates General. The charter was the result of long deliberations and hard bargaining. Both the habits of the Dutch merchants and provincial separatism spoke against a centralized monopoly company. But the Netherlands was at war, and a united company was a potential threat against Spain and Portugal; it might divert part of the Iberian war effort to overseas regions and thus lessen the pressure on Europe, and it undoubtedly would become a new means of economic warfare.²³⁵

The VOC undertook four significant innovations in both structure and policy, signifying a shift towards a fully-fledged capitalist economy. First, *Die Heeren XVII* focussed on the control of stock (spices; bullion) as a guarantee against radical fluctuations in supply and demand, rather than in maximising short-term profits. Second, there was a correlative shift from short-term to medium- and long-term considerations; 'for the European investor it was very difficult to give up the purely bilateral model, which also dominated the trade of the Portuguese crown.' Third, the Company prioritised market penetration—especially throughout the intra-Asian 'country' trade— but, critically, expressly refrained from an Iberian-type practice of territorialism, yielding a vastly superior 'information network' that further enhanced long-term capitalistic planning.²³⁶ Fourth, the Company's resultant trade and communications network permitted the creation of permanent reserves of vast quantities of disposable capital.²³⁷

235 Ibid. 240–41. The self-sustaining financing of the VOC through the internalisation of protection costs appears to have always formed part of Oldenbarnevelt's original plan. 'The permanent maintenance of a strong fleet in the East would be far too expensive for the States General, unless it could be paid for by spoils and profits.' Jan Den Tex, *Oldenbarnevelt*, 2 vols, i (Cambridge: Cambridge University Press, 1973), 301; see 299–313, *passim*. See also Israel, *The Dutch Primacy in World Trade*, 67–73.

236 Steensgaard, *Carracks, Caravans and Companies*, 238–9:

Planned operations in time and space were made possible by an efficient communications network, established already in the second decade of the seventeenth century. Batavia was at the centre of the network; it was there that the information from the Netherlands and from all Asian factories was gathered and co-ordinated, and from there the resources were allocated and the ships, goods, men and money were distributed and redirected according to the information received... in the seventeenth century the system hardly had its equal.

237 Ibid. This may be seen in

the relations between the company centre in Batavia and the company centre in the Netherlands. To the principals in the Netherlands, the balance remaining in Batavia originally meant stock ready to be returned to Europe or stock [bullion] ready to be exchanged for commodities that might be returned with short notice. To the company merchants in Batavia, it came to mean something different, namely the capital remain-

IX Apologia: *Proprietas* and *Occupatio Duplex*

Consistent with the institutional innovations of the VOC, *De Indis* expositis an implied theory of ceaseless capital accumulation, discursively predicated upon the legally enforceable *ius* of both *proprietas* and *communio*. The key to this discursive innovation was Grotius' famed 'eclecticism', or, as we would express it, deep rooted addiction to the logic of dangerous supplements: the entirety of *De Indis* rests upon a repetitive series of rhetorical substitutions between neo-Thomist and Aristotelian notions of Property. In this way, the text clearly demonstrates Koskenniemi's notion of apologetic/utopian alterity; the crucial point is that the discursive oscillation operates not between two extraneous poles but on a 'micro-level' wholly internal to

Naturalism. For Tuck it is the Text's movement towards a 'pure' (i.e. non-Thomist) Aristotelianism that is essential, the discursive complement to the United Province's move towards early Capitalism; '[Grotius]' origins as a humanist are vital to an understanding of his views, for he took the old humanist account of the pursuit of self-interest by individuals or cities, and made it the foundation of an account of rights.'²³⁸

In a superficially anti-Thomistic manner, *De Indis* openly espouses a robust Aristotelianism.

There is one kind of good that is so called in an absolute sense, and there is another that is good from the standpoint of a particular individual. Indeed, to borrow Aristotle's admirable explanation, 'whatever each person's understanding has ruled for him regarding a given matter, that to him is good.' For God created man... 'free and sui iuris,' so that the actions of each individual and the use of his possessions were made subject not to another's will but to his own. Moreover, this view is sanctioned by the common consent of all nations [i.e., customary international law]. For what is that well-known concept of 'natural liberty' other than the power of the individual to act in accordance with his own will? *And liberty in regard to action is equivalent to dominium in material things. Hence the saying: 'Every man is the governor and arbiter of affairs relative to his own property.'*²³⁹

In this seminal passage Grotius makes a move that belies his Scholastic impulses: he implicitly identifies *dominium* with *ius* or 'right'. As Brett has indicated this manoeuvre was first executed by the Scholastic Bartolus: 'in the broadest sense [*dominium*] can be the term for any incorporeal right, as I have *dominium* of an

ing and circulating in Asia in order to make a profit with which to finance the company overheads in Asia and the shipments to Europe.

238 Richard Tuck, *The Rights of War and Peace: Political Thought and International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999), 90.

239 Grotius, *De Indis*, 18. Emphasis added.

obligation; for example, of usufruct.²⁴⁰ Pace Tuck, we would prefer to regard the Grotian Heritage as exhibiting a higher degree of continuity with Primitive Legal Scholarship than not. As a primitive legal scholar, Grotius was naturally embedded within the late-Scholastic/neo-Thomist tradition; in this way, his anti-Portuguese nationalism was well served by the entrenched anti-papalist Universalism of Vitoria and Suarez.

There were, however, significant dangers in relying upon neo-Thomism as a *juro*-discursive legitimation of the VOC. The issue of Catholicism aside—with its attendant legitimation of Iberian territorialism²⁴¹—political Thomism was expressly premised upon *in spiritualibus*; it ‘was very much [a] more moderate realism than moderate nominalism, and consequently all aspects of Thomas’ political system were slated in favour of papal supremacy. The conciliarist elements in Aquinas’ thought, like his tendency to give the lay ruler more freedom of action, were not elaborated by Aquinas himself.’²⁴² The logical corollary of this was the schematic prioritisation of *communio* over *proprietas*, although, admittedly, Suarez had weakened this ‘necessary’ link somewhat. What was even more essential, from the perspective of the self-interest of both the VOC and the United Provinces, was to rhetorically move towards an alternative discursive tradition that could provide a degree of authoritative force equivalent to that enjoyed by the Spanish neo-Thomists. Kennedy’s observation of ‘excessive’ (i.e. by ‘Traditional’ standards) reliance upon authority as a signature characteristic of Primitive Legal Scholarship is critical here, as discussed in Chapter Two. Although Tuck is correct in highlighting the apparent substantive differences between Grotius and the neo-Thomists, he fails to adequately stress Grotius’ ‘deeper’ structural reliance upon and textual reproduction of the *methodology* of Late Scholastic discourse. We may, therefore, tentatively postulate a sub-textual or meta-level methodological continuity between the Grotian Heritage and Primitive Legal Scholarship.

Furthermore, there are reasonable grounds for assuming a deeper continuity on the basis of material historicist considerations as well; any apparent ‘rupture’ between Grotius and the Spanish Thomists is more intelligible within the terms of the respective positions of Holland and Iberia within the Capitalist World-Economy. The alleged ‘differences’ between Grotius and the neo-Thomists are ultimately governed by tactical considerations of optimisation of hegemonic status within the early Modern World-System, these textually manifested through *De Indis* as a superficially ‘new’ or ‘original’ mode of *juro*-political discourse. The fundamental difference on the textual/discursive level resides within the successful hegemonic transition of Holland as the more effective surplus accumulator,

240 Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 22. For Bartolus, ‘*domium* and right [*ius*] coincide in a broad sense’; thus, Bartolus ‘treats usufruct, at least, as an incorporeal right and as object of *dominium*.’ Ibid. 27.

241 The ‘problem’ of a Dutch jurist placing excessive reliance upon Spanish legal authority will be revisited in Chapter Seven.

242 Wilks, *The Problem of Sovereignty in the Later Middle Ages*, 129–30.

signified by its more perfect transition to a private property/corporate model of geo-governance. As Allott has reminded us, the taxonomic classification of proprietary relationships serves as a primary manifestation of social and political power.

By manipulating the content of the bundle of property relations, society can choose which powers to delegate to the property owner and which objectives and social control to include in this delegation. Also, society can, as it were, delegate property power to itself, to institutions deemed to be acting directly on behalf of society as a whole.²⁴³ Thus, property relations lie along a spectrum that extends from essentially socialized property at one extreme, to essentially individualized property at the other. *The social quality of particular property relations is determined by reference to the degree of independence with which the property owner can exercise the delegated social power, that is, the extent to which the owner may use the property for personal purposes rather than in fulfilment of specific social objectives and under the constraint of specific social controls.*²⁴⁴

The significance of the ‘politicisation’ of Natural Law discourse as a manifestation of nascent Dutch/VOC hegemony can scarcely be better expressed. *De Indis* is premised upon a strict binary/iterable relationship between neo-Thomistic *commutative* justice (re. *communio*) and Aristotelian *distributive* justice (re. *dominium*), elevating the category of *proprietas* to ontological primacy, in stark contrast to its unquestionably second-order derivative status among the Late Scholastics such as Suarez.

It must be understood that, during the earliest epoch of man’s history, ownership [*dominium*] and common possession [*communio*] were concepts whose significance differs from that now ascribed to them. For in the present age, the term ‘ownership’ connotes possession of something peculiarly one’s own... something belonging to a given party in such a way that it cannot be similarly possessed by any other party; whereas the expression ‘common property’ is applied to that which has been assigned to several parties, to be possessed by them in partnership... and in mutual concord, to the exclusion of other parties. *Owing to the poverty of human speech, however, it has become necessary to employ identical terms for concepts which are not identical.* Consequently, because

243 The obvious analogy here is the VOC as (semi-) subordinate ‘agent’ of the United Provinces.

244 Philip Allott, ‘*Mare Nostrum: A New International Law of the Sea*’, in Jon M. Van Dyke, Durwood Zaelke and Grant Hewison (eds), *Freedom of the Seas in the 21st Century: Ocean Governance and Environmental Harmony* (Washington, D.C.: Island Press, 1992), 49–71 at 52. Emphasis added. The inverted hierarchy between Dutch corporation and Dutch State, each as legal ‘person’ renders the inherent iterability of the relationship all that more politically potent. ‘The opposition between property and government is transcended in that property becomes akin to a form of delegated governmental power.’ Ibid. See Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 8–38.

of a certain degree of similitude and by analogy, the above-mentioned expressions descriptive of our modern customs are applied to another right, which existed in early times. Thus with reference to that early age, the term 'common' is nothing more nor less than the simple antonym of 'private' [*proprium*]; and the word 'ownership' denotes the power to make use rightfully of common [i.e. public] property. This attribute the Scholastics choose to describe as a concept of fact but not of law.²⁴⁵ For the legal right now connoted by the term 'use' [*usus*] is of a private nature; or, in other words (if I may borrow from the phraseology of the Scholastics), 'use' carries with it a privative force with respect to all extraneous parties.²⁴⁶

This passage is veritably replete with iterability. There is a tactical conflation of the categories of 'State' with 'Person', effecting a mimetic substitution of Holland/Portugal as 'private' parties to a dispute over 'property'. Simultaneously, the 'private person'/VOC is raised to the level of a legally cognisable international actor, the implied bearer of an at least residual degree of legal original personality consistent with corporate realism. 'Use' and 'property', now conjoined thanks to Suarez,²⁴⁷ are then both re-classified as exclusive private right/*ius*, governed by the principle of incorporation; 'common ownership means that each owner has a right over his share'.²⁴⁸ This 'share', in turn, is acquired through the effective exercise of *occupatio*; 'when men begin to occupy and appropriate things and so to assert their proprietorship.'

In a universal sense... inferior things were given for use by their superiors...However, since God bestowed these gifts upon the human race, and not upon individual men, and since such gifts could be turned to use only through the acquisition of possession by individuals, it necessarily followed that...' what had been seized as his own' by each person should become the property of that person. Such seizure is called *possessio*, the forerunner of *usus*, and subsequently of *dominium*.²⁴⁹

245 For example, Suarez.

246 Grotius, *De Indis*, 226–7. Emphasis added.

247 'For *ius* sometimes refers to the moral right to acquire or retain something, whether that right involves true dominion or merely a partial dominion; and the said right is... the true subject matter of justice.' Suarez, 'A Treatise on Laws and God the Lawgiver', 326. For Finnis, Grotius and Suarez 'are on the same side of the watershed... *Ius* is essentially something one *has*'. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 207. Henceforth, *ius* 'no longer refers to an overall regulative and distributive framework... but as something one is free to dispose of as one sees fit.' Westerman, *The Disintegration of Natural Law Theory*, 113.

248 Tully, *A Discourse on Property*, 65.

249 *De Indis*, 11. Keene has suggested that the historical basis for this manoeuvre lies within the 'transposition of a Roman legal concept onto a familiar Dutch practice'. Keene, *Beyond the Anarchical Society*, 65. See Hugo Grotius, *The Jurisprudence of Holland*, 2 vols, i (Oxford: Clarendon Press, 1926), 64–75 and 86–93. The first primitive legal scholar to have developed the concept of *occupatio duplex* and its

From this follows two logically necessary conclusions. Firstly, that which cannot be made practicably subject to *occupatio*, 'or which never has been occupied, cannot be the property of any one, because all property (*proprietas*) has arisen from occupation.'²⁵⁰

The recognition of the existence of private property led to the establishment of a law on the matter, *and this law was patterned after nature's plan*. For just as the right to use the goods in question was originally acquired through a physical act of attachment, the very source... of the institution of private property, so it was deemed desirable that each individual's possessions should be acquired as such, through similar acts of attachment. This is the process known as 'occupation' [*occupatio*], a particularly appropriate term in connection with those gods which were formerly at the disposal of the community²⁵¹... [Accordingly] if any part of the thing in question is susceptible of occupying *in accordance with nature's plan*, that part may become the property of the person occupying it, insofar as is possible without impeding its common use.²⁵²

Secondly, that which cannot be so 'attached'—that is, materially altered or physically control in some decisive manner—through the positive act of *occupatio duplex* cannot be juridically classified as *proprietas*; 'All that which has been so constituted by nature that, serving some one person, it still suffices for the common use of all other persons, is today, and ought in perpetuity to remain in the same condition as when it was *first created by nature*.'²⁵³

The absence of 'God' from this passage is the key to interpretation. *De Indis* clearly does not reside exclusively at the Humanist pole, as it expressly invokes Providential Law; yet, it is not wholly Thomistic either, as 'Nature' is openly deployed as the signifier of *occupatio duplex*. The resolution is premised upon a two-fold iteration between God/Nature and *communio/proprietas*. Whereas for Aquinas, the non-foundational status of exclusive title is the direct result of the 'presence' of God, for Grotius *communio*, although 'natural', is the residuum of an objective inability to positively appropriate. Nature is never explicitly divested of God, yet it is ontologically 'thinned' so that *proprietas* can be legitimated solely on the basis of civic appropriation. The ontology deployed is 'thick' enough to objectively invalidate illicit appropriation, but it is also 'thin' enough to enable

relationship to *res nullius* appears to have been Bartolus. Grewe, *The Epochs of International Law*, 124–5.

250 See Tully, *A Discourse on Property*, 70: 'The Thomist... belief that the world belongs to mankind in common, logically prior to occupation, is elided because property is now said to result from occupation.'

251 Grotius, *De Indis*, 229. Emphasis added. Significantly, the two authorities that Grotius cites for this doctrine are Seneca and Cicero, the arch sources of the strong Naturalism of Late Stoicism. See below, Chapter Five.

252 Ibid. 233. Emphasis added.

253 Ibid. 229. Emphasis added.

the taxonomic (re-) classification of proprietary relations on the basis of material praxis alone.

Accordingly, Grotius follows the Humanist Gentili in 'reading down' *usus et fructus* from *occupatio*. Both authors accomplish this by postulating an analogous relationship between Sea and Air. For Gentili, the Sea is by, 'nature open to all men and its use is common to all, like that of the air. It cannot therefore be shut off by anyone. Its shores, too, are by nature accessible to all, as well as the banks of rivers and rivers themselves, that is to say, running waters.'²⁵⁴ For Grotius

In the precepts of the law of nations... things are described as 'public'... as the common possession of all men and the private possession of none. Air falls into this class for two reasons: *first, because it is not possible for air to be made subject to occupancy; secondly, because all men have a common right to the use of air.*²⁵⁵

It is this deployment of Nature as a mimetic substitute for God that allows *De Indis* to effect the Humanist-inspired transition from 'is' to 'ought' propositions; 'It is evident... that the present-day concept of distinctions in ownership was the result, not of any sudden transition, but of a gradual process whose initial steps were taken under the guidance of nature herself.'²⁵⁶

The Text undertakes a wholesale conflation of Providential Law with Natural Law, *proprietas* 'engraved' on the template of Being as an axiomatic and self-sufficient 'Presence', a discursive move fully consistent with a robustly capitalist approach to exclusionary title. This yields a complete metaphysical inversion of the conventional hierarchical relationship between Public and Private property, concomitant with the text's wider inversion of the relationship between 'State' and 'Person'.

We find that those things which are created from the original domain of common ownership have been divided into two categories. For some are now public property... they are owned by the people, which is the true meaning of the expression 'public property'; and others are strictly private property... they belong to individuals. Nevertheless, occupancy of public possessions is achieved by the same method as occupancy of private possessions... Lands that do not fall into the possession of any nation in the process of apportionment, are called... 'undefined' regions, marked by no fixed limits.²⁵⁷

The central discursive stratagem of *De Indis* is to effect a revolutionary and systematic re-classification (prescription) of the taxonomic categories of Property Law and to then tactically redeploy them in the juridical resolution of the international legal status of the High Seas, the trans-national watercourse to the

²⁵⁴ Gentili, *De Iure Belli Libri Tres*, 90.

²⁵⁵ Grotius, *De Indis*, 231. Emphasis added.

²⁵⁶ Ibid. 228.

²⁵⁷ Ibid. 230.

Spices/East Indies. Since the pelagic Oceans were never ‘attached,’ they fail to qualify as *proprietas*, but remain as *communio*.

Occupancy of public possessions is achieved by the same method as occupancy of private possessions. Seneca... makes this observation: ‘We designate as ‘territory of the Athenians’ or ‘territory of the Campanians,’ lands which the inhabitants in their turn divide among themselves by fixing private boundaries’²⁵⁸... It is quite impossible for the sea to be made the private property of any individual, for nature does not permit but rather commands, that the sea shall be held in common. Furthermore, not even the shore can become private property²⁵⁹... [Therefore] it is impossible that any private right over the sea itself... should pertain to any nation or individual... since the occupation of the sea is impermissible both in the natural order and for reasons of public utility... It is clear that the Portuguese have not established a private right over that part of the sea which one traverses in sailing to the East Indies. For both of the factors impeding private ownership are infinitely more cogent in this particular case than in any of the others mentioned.²⁶⁰ What constitutes merely a difficulty in those other cases is in the present instance an absolute impossibility; and what we condemned as an injustice in a different connection is in this instance utterly barbarous and even inhuman.²⁶¹

Although twentieth-century advocates of the Grotian Heritage unanimously regard Grotius as a ‘progressive’ figure in the historical development of the Law of the Sea through his exposition of the concept of *res communis*, what is universally forgotten is that Grotius’ overriding concern is with the radical *privatisation* of property rights. The alleged ‘positive’ right of the ‘Freedom of the High Seas’ is the outcome of a *negative* inferential process; the positive entitlement to freedom of navigation is derivative from a prior negative finding of the empirical non-fulfilment of the threshold requirements of *occupatio duplex*. The twentieth-century, ‘pro’- Developing World innovations (e.g. G-77) regarding *res communis* or the ‘Common Heritage of Mankind’ are thoroughly absent from the original text precisely because they are too closely aligned with the neo-Thomistic tradition.²⁶²

258 Ibid.

259 Ibid. 232.

260 For examples from Roman jurisprudence, See *ibid.* 233–8.

261 Ibid. 238.

262 For *proprietas* as derivative of *communio*, see the comments made about Suarez earlier in this chapter. To cite just one example: the 1926 English-language of *Mare Liberum* translates the original Latin text—‘Quod sit contra illud ius constat, quia non solum maria aut aequora eo *iure communia* errant sed etiam reliquae omnes res immobiles’—as: ‘And this seems to be true because by that same law not only the seas or waters, but also all other immovables were *res communis*.’ Emphases added. Hugo Grotius, [*Mare Liberum*] *The Freedom of the High Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, ed. James Scott Brown (New York: Arno Press, 1972), 53.

Even though [the High Seas] are correctly called *res nullius* insofar as private ownership is concerned, they are very different from those which are also *res nullius* but which have not been assigned common use: e.g. wild beasts, fish, and birds. Items belonging to the latter class can be made subject to private ownership, provided that someone does take possession of them; whereas items falling within the former class have been rendered forever exempt from such ownership by the unanimous agreement of mankind, in view of the fact that the right to use them, pertaining as it does to all men, can no more be taken from humanity as a whole by one individual than my property can be taken from me by you... Thus Athenaeus depicts the master of the feast as maintaining that the sea is common property, whereas fish become the property of the persons who catch them... In *The Rope*, the fisherman assents when the young slave says, 'The sea's most certainly common to all,' but when the slave adds, 'Tis common property found in the sea,' the fisherman justly objects, 'Whatever is caught by my net and hook is mine in the truest sense.'²⁶³

As Vermuelen has indicated,

For Grotius, the sea is *res communis* in that it is insusceptible of central authority. However, the principle of a common heritage implies something to be administered in common and thus contains the notion of a trust, as expressed in Article 137 [UNCLOS III], indicating that 'rights in the resources of the Area are vested in mankind as a whole on whose behalf the [Deep Seabed] Authority shall act'... This means that the common heritage is a species of co-ownership or condominium, to be administered by a [supra-national] authority... Grotius' basic concepts of *dominium* (property), *imperium* (protection and jurisdiction) and *res communis* cannot provide for a refined system in which different uses (navigation, military activity, exploration) give rise to specific rights.²⁶⁴

Furthermore, as Tuck himself acknowledges, *De Indis* is thoroughly immersed in the discursive logic of colonialist appropriation.

It is easy to see how Grotius was able to argue from these premises that the [High] sea was not yet private property in the modern sense²⁶⁵ but equally that men did have rights of a kind over it and on it. What they enjoyed were the original rights of dominium; they could take what they wanted, knowing that they had a definite right to do so. This right was also something which they had as the further right to protect against threats; by putting forward this theory of property, Grotius had provided a useful ideology for the competition over material resources in the non-European world, and had clearly begun the intellectual process that was to culminate in the competitive rights of the Hobbesian state of nature. But he had also... moved away from a humanist and Aristotelian moral

²⁶³ Grotius, *De Indis*, 232.

²⁶⁴ Ben Vermeulen, 'Discussing Grotian Law and Legal Philosophy', *Grotiana*, NS 6 (1985), 84–92 at 91.

²⁶⁵ It *still* is not!

theory to something which, *despite the differences, was substantially closer to the late medieval scholastic tradition*.²⁶⁶

In other words, Naturalism serves as the necessary discursive precondition for the establishment of inalienable common rights over *res nullius*. It is precisely this foregrounding of the ‘systematizing’ aspects of Late Scholasticism that separates *De Indis* from Humanist texts such as Gentili’s *De Iure Belli*,²⁶⁷ which fails to undertake a similar discursive oscillation between competing frames of *ius naturale*.

Contra Tuck, however, we would assert that he has inverted the correct relationship between the myriad authoritative sources of Grotius’ ‘universe of texts’;²⁶⁸ what Tuck experiences as a ‘problem’ that requires explanation is precisely that which we would most expect to find. The Late Scholastic tradition—that is, the

266 Tuck, *Natural Rights Theories*, 62. Emphasis added. The crucial discursive link is provided by Suarez’s development of the theory of *communitatis rerum*. ‘There are striking similarities to be found between Suarez’s and Grotius’ treatment of natural law. These similarities might be ascribed to Grotius having read the Spaniards, but might equally be conceived as the logical outcome of having to deal with the same conceptual problems.’ Westerman, *The Disintegration of Natural Law Theory*, 131.

267 C.XIX of Part One of *De Iure Belli* encapsulates *the entirety* of Grotius’ argument concerning the High Seas.

But although we say the use of all these things [Sea, Air, Rivers] is common to everyone, yet this opinion also is said to be accepted, that the possession of them may be acquired and that the possessions may prevent others from using them. That accordingly the Venetians could prohibit others from entering their part of the sea, not because the Venetians had become lords of the sea, which cannot fall under the control of anyone, but because they were the possessors of that portion of it. But I cannot admit that view, which by vain circumlocation violates the law of nature. For if the sea has been opened to all by nature, it ought to be closed to no one. To close it is usurpation, and usurpation is an unlawful act.

Gentili, *De Iure Belli Libri Tres*, 91. Grotius berated Gentili for the latter’s alleged lack of consistent method; see Peter Haggemacher, ‘Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture’, in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 133–76 at 160–7.

268 Haggemacher cited in C.G. Roelofsen, ‘Grotius and the “Grotian Heritage” in International Law and International Relations: the Quatercentary and its Aftermath (circa 1980–1990)’, *Grotiana*, NS 11 (1990), 6–28 at 26. Elsewhere, discussing *De Iure Belli ac Pacis*, Haggemacher remarks that the text ‘was liable to be used and reinterpreted in several new directions regardless of the author’s initial intent, the more so on account of its frequent ambiguities and ‘open textures’’. P. Haggemacher, ‘On Assessing the Grotian Heritage’, in T.M.C. Asser Instituut (ed.), *International Law and the Grotian Heritage* (The Hague: T.M.C. Asser Instituut, 1985), 150–60 at 159. Revealingly, Roelofsen takes exception with Haggemacher’s phraseology: ‘To me this smacks somewhat of modern deconstruction’. Roelofsen, ‘Grotius and the “Grotian Heritage” in International Law and International Relations’, 26. This is, of course, the entire point.

neo-Thomistic/anti-Universalist phase of the final stages of the European world system—is, in fact, Grotius' point of origin, via the meta-level continuity of Primitive Legal Scholarship; the Grotian Text is at least as much anti-Rome as it is anti-Lisbon. In this sense, the prioritisation of Portugal as main juridical/textual protagonist is merely a faithful reflection of interstate hegemonic rivalry; the 'deeper' juro-discursive function is governed by the logic of neo-Thomism. Viewing *De Indis* as a singular instance of the logic of the dangerous supplement, it becomes clear that Grotius manages to potentially subvert his own position; if the Portuguese were able to demonstrate in some compelling manner that they had in fact established effective *occupatio duplex* over the High Seas, then *dominium* would accrue to them. The primary target of Grotian legal critique is the legitimacy of the primary act of *Inter caetera* signified by the Treaty of Tordesillas and the subsequent conveyance to the Portuguese of the exclusionary title/*proprietas/mare dominium* over the watercourse to the Spiceries.

Within the discursive field of anti-*monarchia universalis*, two rhetorical moves are thus crucial to Grotius' overall discursive stratagem: (i) he establishes a necessary correlation between the 'ordinance of nature' (i.e. Natural Law) and 'common consent' (i.e. international customary law; *opinio iuris*) within the parameters of a broader, historically-based argument concerning the customary law of nations²⁶⁹ and; (ii) the re-classification of Property Law produces the normatively yearned for resolution, by being itself made subject to the dictates of Natural Law. It is through the common ownership of the seas/*mare liberum* that the 'common interest' is best realized, this constituting the greater moral good.

*This concept of common ownership had reference... to the use of things involved... Thus a certain form of ownership did exist, but it was ownership in a universal and indefinite sense. For God had given all things, not to this or that individual, but to the human race; and there was nothing to prevent a number of persons from being joint owners in this fashion, of one and the same possession. But such a concept would be completely irrational if we were giving to the term 'ownership' its modern significance, involving private possession [proprietas], an attribute that did not reside in any person during that epoch.*²⁷⁰

This stratagem is effected 'by reconstituting the vocabulary of property law in such a way that it becomes impossible to express the Thomist concept of private property.'²⁷¹

Although the sea is variously described in the phraseology of the law of nations as *res nullius*, as common property, and as public property, the significance of these different terms will be easily explained if, in imitation of the method employed by all the poets

269 Nowhere does Tuck consider *opinio iuris* and customary law in their formally legal dimension.

270 Grotius, *De Indis*, 228.

271 Pauw, *Grotius and the Law of the Sea*, 65.

since the days of Hesiod as well as by the ancient philosophers and jurists, we draw a chronological distinction between things which are, perhaps not differentiated from one another by any considerable interval of time, but which do indeed differ in certain underlying principles and by their very nature. Moreover, we ought not to be censured if, in our explanation of a right derived from nature, we avail ourselves of the authority and express statements of persons generally regarded as pre-eminent in natural powers of judgement.²⁷²

Not the least striking feature of this self-consciously rhetorical passage is the potentially self-subverting co-joining of so many disparate juridical and discursive traditions; the ultimate effect is an endlessly open-ended and iterable ‘universe of texts’. The difficulties of hermeneutical reconstruction are compounded through a chaotically alternating relationship between positive and negative rights. Throughout, *De Indis* teeters on the edge of incoherence through its systematic conflation of *res nullius* (negative category) and *res communis* (positive category).²⁷³ The fact that Grotius has already conceded the issue of terminological precision—‘Owing to the poverty of human speech... it has become necessary to employ identical terms for concepts which are not identical’²⁷⁴—does not make the critical reader’s task any easier. The only persuasive means of imposing even a modicum of interpretative coherence upon the passage is for *res communis* to be ‘read down,’ albeit in a qualified manner, from *res nullius*. Expressed schematically, we would have to reconstruct the internal logic of the Text in the following manner.

- (1) Under the negative category of *res nullius*, the High Seas physically exceed the practical capacity of the Portuguese to establish both *ius/right* and ability to exclude via the strict requirements of *occupatio duplex*.

²⁷² Grotius, *De Indis*, 226.

²⁷³ Ian Brownlie, *The Principles of Public International Law*, 4th edn (Oxford: Oxford University Press, 1980), 180–1.

In primitive texts, sovereign authority entailed either property or lack of property. In the modern world, preoccupied with the boundary between national states and international community, we think of property as a municipal expression of sovereignty, ratified by the international regime of participation and jurisdiction. A regime of ‘no property’ seems dangerously vacant, a threat to the completeness of the international procedural framework.

David Kennedy, *International Legal Structures* (Baden-Baden: Nomos Verlagsgesellschaft, 1987), 212.

²⁷⁴ Grotius, *De Indis*, 227. See above.

These, then, are the things described by the Romans as common to all under natural law, or as public under the law of nations, which... is another way of saying the same thing. In like manner, the Romans sometimes describe the use of such things as common, while at other times they refer to it as public.

Ibid. 232.

- (2) The negative absence of both Portuguese *ius* and ability to actively exclude passively enables the Dutch to freely navigate the contested maritime spaces; here, the physical inability to exclude, under the strict logic of equivalence, is discursively identical to the positive right to transverse.
- (3) *Res communis*, operating in a parallel manner to *res nullius*, gives rise to a meta-analogical series of juridically enforceable positive rights; that which cannot be unilaterally subjected to exclusionary title/*proprietas* must, in accordance with Natural Reason, be the subject of the common rights/interests of the community (as signified by the discursive shift from a relatively 'thin' to 'thick' ontology, or Presence), Natural Law impeding statist positivism/*ius gentium secundarium*.
- (4) The 'metaphysical' grounding of the positive right to *res communis* is predicated upon, in descending order of ontological 'thickness' as (i) Providential Will; (ii) Nature, or the defining conditions of physical creation, the direct emanation of Providential Design/Intent; (iii) Natural Law, as revealed through the 'correct' application of Natural Reason, which is itself the 'sign' of the necessary ontological relationship between secular law (*iure gentium*) and Providential law (*lex aeterna*), and; (iv) International Customary Law, the normatively binding construction of 'universal assent', independently verified through the Custom's logical correspondence to Natural Reason.
- (5) The Freedom to Trade/*lex mercatoria*, the positive right to freedom of navigation as guaranteed through both Nature and Natural Law, corresponds to the extra-*proprietas* status of the High Seas as both *res nullius* and as *res communis*.

This 'micro-oscillation' between 'thick' and 'thin' ontology textually replicates the discursive prioritisation of *ius naturale* over positive *ius*. Within *De Indis*, Natural Law that operates as 'Presence'; the crucial point is that the text undertakes a systemic discursive migration between rhetorical poles, not between Naturalism and Positivism, but between a subset of binary positions internal to Natural Law. In language highly reminiscent of Koskenniemi, Tuck declares that Grotius

ingeniously linked together both the scholastic and humanist theories. It was true that there was no private property in the latter sense in the state of nature: the scholastics were wrong in thinking that there was a natural dominium identical in nature to civil dominium. But the humanists were also wrong in denying man any rights under a natural order. There was a unique kind of right, *which might be termed dominium by similitude or analogy*. Natural man *was* the subject of rights.²⁷⁵ Moreover, the rights he possessed, though not strictly property rights, were not categorically dissimilar. Grotius made this point clearer when he went on to argue that there need have been no abrupt

²⁷⁵ But only insofar as Grotius was operating within the Scholastic tradition. See John Trentman, 'Scholasticism in the Seventeenth Century', in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100–1600* (Cambridge: Cambridge University Press, 1982), 818–37, *passim*.

transition from such a state of nature into civil society with its familiar property relationships.²⁷⁶

X Utopia: *Liberum Commercium* and *Res Extra Commercium*

It is easy to forget how revolutionary a concept *mare liberum* was within the early Modern World-System,²⁷⁷ signifying a wholly capitalistic approach to the issue of *dominium*. In strictly economic terms, Grotius' classification/prescription of the High Seas as *res communis* facilitates the unlimited expansion of free trade, the materialist expression of the *summum bonum*. There is a clear discursive transition from the 'apology' of *occupatio* to the 'utopia' of global *mare liberum* and *liberum commercium*, both 'signs' of Holland's status as successful hegemon. *Liberum commercium* is suffused by the Presence of *ius naturale*, as *iure gentium secundarium* operates as an ontological derivative of Natural Law.

We hold that, by the authority of that primary law of nations whose essential principles are universal and immutable, it is permissible for the Dutch to carry on trade with any nation whatsoever... *Consequently, anyone who abolishes this system of exchange,*²⁷⁸ *abolishes also the highly prized fellowship in which humanity is united. He destroys the opportunities for mutual benefactions. In short, he does violence to nature herself...* In Seneca's opinion, the supreme blessing conferred by nature resides in these facts: *that by means of the winds she brings together peoples who are scattered in different localities, and that she distributes the sum of her gifts throughout the various regions in such a way as to make reciprocal commerce a necessity for the members of the human race.*²⁷⁹

Here, Grotius is drawing upon a well-established form of ontological or 'Providentialist' argument that can be traced back directly at least as far back as Libanius in the fourth century C.E.

God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another. And so He called commerce into being, that

276 Tuck, *Natural Rights Theories*, 61. Emphasis added.

277 W.S.M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925), 106–7; see also Thomas Wemyss Fulton, *The Sovereignty of the Sea* (London: William Blackwood and Sons, 1911), 338–77.

278 The Portuguese.

279 Grotius, *De Indis*, 218. Emphases added. For an excellent discussion, see Ilena Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' "De Iure Praedae"—The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"', 31 *Brooklyn Journal of International Law*, 31 (2006), 741–804 at 756–74.

all men might be able to have common enjoyment of the fruits of the earth, no matter where produced.²⁸⁰

Through Libanius' students St. Basil and St. John Chrysostom, the theo-ontological basis of international commerce entered mainstream Christian discourse.²⁸¹ Again, although there is no evidence of direct influence between the two jurists, Althusius' notion of symbiotics clearly parallels Grotius' own providentialist rhetoric.

God has distributed his gifts in diverse ways among men. He did not give one person everything, but different things to different people, so that I should need what you have, and you should need what I have; thus arose the necessity, as it were, of sharing (*communicandorum*) what was needful and useful, and this intercourse (*communicatio*) could only take place in socio-political life (*politica vita sociali*). Therefore God willed that one person should need the labour and aid of another, so that friendship (*amicitia*) might overwhelm each and all... For if one person did not require another's aid, what society, reverence, order, reason, humanity would there be?... These were the reasons why villages were built, cities constructed, academies founded, and why many farmers, craftsmen, smiths, architects, soldiers, merchants, the educated and the uneducated, were joined together (*copularunt*) through their diversity in civil unity and society, as so many members of the same body; so that, as people supplied each other's needs, and took from others what they required, all alike should be gathered together into a kind of public body—which we call a commonwealth (*respublica*)—and by mutual aid (*mutuis auxiliis*) should attend to the general good and safety of that body.²⁸²

For Grotius, any breach of *liberum commercium* serves as a just cause of *bellum iustum*, consistent with the normative holistic framework provided by *ius naturale*. Tuck's revealing comments concerning 'dominium by similitude or analogy' underscore the implicit but necessary binary relationship between the antinomies of Aristotelianism and Thomism.

280 Jacob Viner, *The Role of Providence in the Social Order: An Essay in Intellectual History* (Princeton: Princeton University Press, 1972), 36–7. See also 27–54. It is important to note that Libanius' formulation reflected, in turn, the ontologically 'thick' Natural Law of the late Stoicism; *ibid.* 37. Viner detects the presence of the 'thick' ontology of theological discourse suffusing the entirety of the era of 'classical' economic theory; see *ibid.* 55–113.

281 *Ibid.* 37.

Libanius is to be interpreted both as influenced by Christianity and as having through his writings and his students contributed to Christian theology an idea which was later to be accepted by many Christians as one of that theology's most admirable elements, namely, the idea that God intended commerce to operate as a unifying factor for all mankind.

282 Althusius cited in Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 134; see also, Althusius, *The Politics of Johannes Althusius*, 18.

Private individuals and states were interchangeable with respect to property, and a state's boundaries were the same kind of thing as the boundaries of a private estate. In some ways, such an assimilation of the public and the private realms was characteristic of all rights theorists from Gerson onwards; for by attributing rights of dominium or a kind of sovereignty to individuals in the state of nature, they immediately made a distinction between the two realms fluid (iterability) and in effect purely a question of numbers. Grotius recognised the un-Aristotelian character of all of this, and of his general claim that 'human society does indeed have its origin in nature, but civil society as such is derived from deliberate design.'²⁸³ —by which he meant that there is a natural obligation to mankind as such, and natural moral rules for men, but no such obligation to the state [Divisible Sovereignty]. He felt obliged to find some quotation from Aristotle himself, the author chiefly relied upon by those who hold the contrary view in order to justify his position, thereby revealing his [philosophical] schizophrenia at this time.²⁸⁴ On the one hand, he was still avowedly an Aristotelian, but on the other the content of his theory had moved him well away from any genuine Aristotelianism.²⁸⁵

It is absolutely crucial to appreciate that, contrary to earlier authorities, such as Scott,²⁸⁶ Grotius moves *from* Civic Humanism towards Late Scholasticism in a manner strikingly reminiscent of Koskeniemi's 'discursive oscillation'

The Ordered plan of nature... has a very important bearing upon... the discussion. For... it would be a waste of effort to pass judgement regarding acts whose scope is international rather than domestic—acts committed, moreover, under conditions not of peace but of war—solely on the basis of written laws... In any controversy arising between claimants of sovereign power the sole judge is natural reason, the arbiter of good and evil... Therefore, it is from some source other than the corpus of Roman laws that one must seek to derive that pre-eminent science which is embodied, according to Cicero, in treaties, pacts, and agreements of peoples, kings, and foreign tribes, or... in every law of war and peace... The true way, then, has been prepared for us by the jurists of antiquity whose names we revere, and who repeatedly refer the art of civil government back to the very fount of nature... We must concern ourselves primarily with the establishment of this natural derivation. Nevertheless, it will be of no slight value as a confirmation of

²⁸³ Ibid. 92.

²⁸⁴ Or, as we would say, iterability between the Scholastic and Civic Humanist traditions.

²⁸⁵ Tuck, *Natural Rights Theories*, 63.

²⁸⁶ James Brown Scott, *The Spanish Origins of International Law: Francis de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1934), 71 and 118. 'For if Grotius was not a Spaniard by blood, he was a Spaniard in his conception of international law, and so far as the basic principles of his system are concerned, he was indubitably a member of the Spanish School.' Scott cited in James Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Traditio*, 28 (1972), 483–93 at 488. On the issue of earlier legal scholars on the question of Grotius' affinity with Late Scholasticism, see *ibid. passim*.

our belief, if the conviction already formed on the basis of natural reason is sanctioned by divine authority.²⁸⁷

Grotian continuity with Primitive Legal Scholarship is maintained through the Text's expedient appropriation of central tenets of neo-Thomism as a means of advancing the juro-political interests of the VOC. This strategic reliance upon Spanish authorities is driven by the discursive necessity of utilizing Naturalism as the normative holistic framework juridically regulating trans-national space(s), now fractured through the negation of *monarchia universalis*: 'By gathering together the precepts of Natural Law... Grotius attempts for the first time to demonstrate that an international legal system can be constructed in accord with the new conditions following upon the collapse of the Universal Empire and the Universal Church.'²⁸⁸

The High Seas themselves now become classified as things beyond prescription, signifying the outer parameters of licit mercantile transaction: *extra commercium*; 'We hold that, by the authority of that primary law of nations whose essential principles are universal and immutable, it is permissible for the Dutch to carry on trade with any nation whatsoever.'²⁸⁹ Here, free trade acts as the universal signifier of 'Freedom' in its totality, the *personae dramatis* of the Text being divided between the Absolutist/territorialist Portuguese and the capitalist/entrepreneurial Dutch.

What, then, can be so manifestly unjust as a situation in which the Iberian peoples hold the entire world tributary, in such a fashion that neither buying nor selling would be permissible save in accordance with their pleasure... It is not to be supposed that the institution of trade was devised for the benefit of a few persons. On the contrary, it was established in order that one person's lack might be compensated by recourse to the abundance enjoyed by another, though not without a just profit for all individuals taking upon themselves the labour and peril involved in the process of the transfer.²⁹⁰

The capitalist logic of the VOC permeates the totality of the Text, re-configuring international exchange in terms of potentially infinite capital accumulation and proprietary interests; the joint-stock company elevated to the level of global hegemon.

Grotius was much more... willing to explain everything in terms of the transfer of dominium, and to treat liberty as a piece of property, than anyone in the Protestant Aris-

287 Grotius, *De Indis*, 6–7. Emphasis added. This key phrase of 'the ordered plan of nature', used in conjunction with the Late Stoic authority of Cicero, render the passage 'thickly' Naturalist.

288 Kenneth R. Simmonds, 'Hugo Grotius and Alberico Gentili,' *Jahrbuch für Internationales Recht*, 8 (1959), 80–105 at 99.

289 Grotius, *De Indis*, 218.

290 Ibid. 261.

totelian tradition.²⁹¹ And it was this willingness to think in this kind of way which led him to the first of his original ideas (of whose originality he was himself well aware). It was in some ways the central theme of his work, for it enabled him to justify his claims for free competition on the high seas.²⁹²

As I will now show, we may consider the High Seas as *res extra commercium* and not *res nullius* as Grotius' 'final' position concerning marine taxonomy. The highest purpose of those portions of *De Indis* devoted to *mare liberum* is to conclusively demonstrate that oceanic spaces juridically supersede both the positive and customary right of prescription.

XI Naturalist Ontology: 'Thick' and 'Thin'

Having established the corollary between the sea and public property/*res communis*, and the sea as a site of lawful public activity-use/*extra commercium*, *De Indis* effects a compelling mimetic identification of the free trade and entrepreneurial activities of the Dutch and the collective/communitarian interests of Humanity as a universal positive juridical category; the sea is transferred from the realm of exclusionary title to the domain of public interest, the implementation of the capitalist World-Economy on a global scale.

Not only does *De Indis* perform a necessary act of symbolic validation,²⁹³ but the Dutch are represented as simultaneously fulfilling a critical hegemonic function: the effective global enforcement of free trade, discursively identical with the international rule of law. In his unpublished *Defensio* against William Welwood, Grotius makes a similar argument concerning fishing.

Ownership is separate from dominium (*imperium*), consequently law (*iuris*) is declared with regard to other matters; secondly, the authority of declaring the law or of exercising dominion is restrained by the law of nations. The prince exercises dominion and declares the law not with regard to human matters only, but also with regard to divine matters, but he cannot order what has been forbidden by God or forbid what has been ordered by God. The supreme power has the judgement over civil laws and guardianship and protection over divine law, natural law and the law of nations. Therefore, even

291 Presumably because of his professional relationship with the VOC.

292 Tuck, *Natural Rights Theories*, p. 60.

293 English publicists sought to ideologically legitimise the nascent British Empire along similar proto-hegemonic lines, the Commonwealth as a discursive construct governed by the chain of necessary signifiers: 'Protestant, commercial, maritime and free.' Armitage, *The Ideological Origins of the British Empire*, 170–98.

Mare Liberum was much more than a pleading in a particular case. An earnest and powerful appeal was made to the civilised world for complete freedom of the high seas for the innocent use and mutual benefit of all. Grotius spoke in the name of humanity as against the selfish interests of the few.

Fulton, *The Sovereignty of the Sea*, 344.

if a prince has real jurisdiction over the sea and indeed the Ocean, this would not have anything to do with his claiming ownership of the sea, but with his guarding its community; not with his prohibiting fishing to any man, but with defending the freedom of fishing.²⁹⁴

As Kennedy reminds us, for Primitive Legal Scholarship the Just War can only take place within a holistic normative world-order, albeit for Grotius an order that is substantially ontologically ‘thinner’ than the one postulated by the Late Scholastics. In terms of the literary or propagandistic dimensions of the Text, it is even possible of viewing *De Indis* as collapsing the Providential into the secular, wherein Dutch privateering is invested with ontological *gravitas*, the metaphysical correlative of the successful hegemonic transition to Dutch primacy. Interpreted this way, the Grotian Text appears to verge on the incoherent, if not the chaotic. The ‘saving’ element, however, provided by the Text itself, is the taxonomic re-classification of the VOC as an international ‘private’ legal personality, which provides an objective element of discursive continuity with the Late Scholastic tradition.

XII *Bellum iustum and Res Extra Commercium*

Logically, a ‘thick’ ontology should equate with a ‘strong’ rights theory. Given Grotius’ metaphysical prevarications, however, there is entrenched academic debate as to the presence of a systematic Natural Rights Theory within his work. The differences between Tuck²⁹⁵ and Bobbio²⁹⁶ notwithstanding, Zuckert’s intermediary position seems to reflect a general consensus; ‘Grotius contributed to the ultimate triumph of natural rights philosophy not because, as some scholars claim, he propounded a philosophy of that sort himself, but because from his different Aristotelian principles he accustomed political men to thinking about politics in terms that the natural rights philosophy would later adopt.’²⁹⁷ Apart from indicating *De Indis*’ taxonomical proximity to a legal brief rather than a formal philosophical treatise, Zuckert broadly hints at a resolution of a wider issue: that *ius* is introduced precisely *in order to* legitimate interstate warfare. The

294 Hugo Grotius, ‘Defence of Chapter V of the Mare Liberum’, in *Some Less Known Works of Hugo Grotius*, ed. Herbert F. Wright (Leiden: Brill, 1928), 154–205 at 205.

295 Tuck, *Natural Rights Theories*, 80: the Grotian corpus ‘was the first major exposition of a strong rights theory.’

296 Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (Chicago: University of Chicago Press, 1989), 149–71; ‘The theory of natural rights is born with Hobbes. There is no trace of it in Grotius.’ Ibid. 154.

297 Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994), 141 and 119–41, *passim*. See also Nicholas Greenwood Onuf, *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998), 17.

violation, or *iniuria*, of *ius* is that which lawfully gives rise to *bellum iustum*.²⁹⁸ The Grotian discursive formation of the Just War is premised solely upon the taxonomic classification of the specifically *corporate* form of the Sovereign as lawful combatant.

*Every war derived entirely from just causes is a just war*²⁹⁹... He who wills the attainment of a given end, wills also the things necessary to that end. God wills that we should protect ourselves, retain our hold on the necessities of life, obtain that which is our due, punish transgressors, and at the same time defend the state, executing its orders as well as the command of its magistrates... But these divine objectives sometimes constitute causes for undertaking and carrying on war. In fact, they are of such a nature that it is impossible for us to attain them without recourse to warfare... Just as a certain natural conflict is waged... between dryness and moisture, or between heat and cold, so there is a similar conflict between justice and injustice. Indeed, factual evidence clearly shows that there are in existence many men of a bloodthirsty, rapacious, unjust, and nefarious disposition,³⁰⁰ traitors to their native lands and disparagers of sovereign power—men who are strong, too, and equipped with weapons—who must be conquered in battle... in order that they may be brought to book as criminals. Thus it is God's Will that certain wars should be waged; that is to say (in the phraseology of the theologians), certain wars are waged in accordance with God's good pleasure. Therefore, some wars are just, or... it is permissible to wage war.³⁰¹

Grotius makes a similar teleological argument in the *Commentarius*.

Such a power [of *bellum iustum*] may be held *de iure* only in so far as it is held *de facto*³⁰²... A natural right is to be demonstrated from its ends. For all things required for the fulfilment of some end that nature has determined for herself within human society are just according to natural law.³⁰³ The natural end towards which the individual marks of sovereignty tend, cannot be realized unless there exists a right of executing

298 Haggemacher, 'Grotius and Gentili', 104–6; Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law', *American Journal of International Law*, 33 (1939), 665–88 at 668–9; Arthur Nussbaum, 'Just War—A Legal Concept?', *Michigan Law Review*, 42 (1943), 453–79 at 457; Jonathan Barnes, 'The Just War', in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100–1600* (Cambridge: Cambridge University Press, 1982), 771–84 at 777–8.

299 Grotius, *De Indis*, 59.

300 The Portuguese.

301 Grotius, *De Indis*, 31–2.

302 Grotius, *Commentarius in Theses XI*, 239.

303 Francisco de Vitoria, 'On Civil Power', in id. *Francisco de Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 1–44 at 9.

each mark on the willing and the unwilling alike. Hence, there exists some natural right to exercise this mark which, when exercised upon the unwilling is called 'war'. And, since the mark [of sovereignty] is naturally linked to the means that tend towards the end of that mark, there is no natural reason why the right these means should rest with another person than the one who has the mark, just as each person has the natural right to defend himself. Nor can it be demonstrated that this right of applying the means may be taken away from the one who has the mark. Therefore, whosoever has a mark [of sovereignty], also has the right to wage war in defence of that [specific] mark.³⁰⁴

On this level, Grotius maintains complete consistency with the Late Scholastics.³⁰⁵ His major innovation appears less to involve the issue of *iusta causa* but rather the issue of 'superior authority', or *auctoritas principis*,³⁰⁶ identified by Aquinas as one of the three necessary preconditions of the Just War:³⁰⁷ 'The first is the authority of the sovereign [*auctoritas principis*] on whose command war is waged.'³⁰⁸ Most important is that Aquinas unconditionally rejects the possibility of a just private war.

Now a private person has no business declaring war; he can seek redress by appealing to the judgement of his superior. Nor can he summon together the whole people, which has to be done to fight a war. Since the care of the commonwealth [*reipublicae*] is committed to those in authority they are the ones to watch over the public affairs of the city, kingdom or province in their jurisdiction.³⁰⁹

Not surprisingly, the *Commentarius* adopts a strictly neo-Thomist line on this issue; *bellum iustum* must remain solely within the public domain as the legality of the war of national liberation was ultimately justified by the formal status of the Dutch Republic as a sovereign state.

A war is 'public' when it is waged by one who holds an authority to do so and which is not directed towards his private good, but the good of the state [*respublicae*]. Yet he

304 Grotius, *Commentarius in Theses XI*, 237.

305 Elbe, 'The Evolution of the Concept of the Just War in International Law', 678; Suarez, 'A Treatise on Laws and God the Lawgiver', 29–32; Francisco de Vitoria, 'On the Law of War', in id. *Francisco de Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 293–327 at 313–14.

306 Barnes, 'The Just War', 775–6.

307 The other two are 'just cause'/*iusta causa* and 'right intent'/*recta intentio*. 'Secondly, a just cause is required, namely that those who are attacked are attacked because they deserve it on account of some wrong they have done... Thirdly, the right intentions of those waging war is required, that is, they must intend to promote the good and to avoid evil.' Aquinas, *Summa Theologiae*, Vol. 35, Q. 40, 82–3. See Nussbaum, 'Just War—A Legal Concept?', 457.

308 Aquinas, *Summa Theologiae*, Vol. 35, Q. 40, 80–1.

309 Ibid.

who holds a mark of sovereignty has the authority to wage war... This authority is not of itself directed towards [his] private good [*bonum privatum*]. The [just] war, therefore, must be public.³¹⁰

However, in a brazenly self-serving manoeuvre, *De Indis* expressly repudiates the neo-Thomist insistence upon juridical recourse argued for in its 'twin' text.

Let us consider those wars which are undertaken by private individuals.³¹¹ Here we are at once confronted with a rather grave difficulty. For a private war cannot possibly be preceded by a judicial process, since the power of judgement resides in the state and the war would cease to be private as soon as the state interposed its authority.³¹²

Punitive and enforcement actions against the Iberians are necessary to maintain the holistic normative order, violated by Portugal's illicit conflation of *imperium* with *dominium*, thereby compelling the Dutch to unilaterally exercise jurisdiction. The paradox is that the responsible 'law-enforcing' agency in question as regards *commercium liberum* in the East Indies is a Corporation, with the paradoxical result that the *de facto* function of *iurisdictio* devolves upon a 'Private Person', which, by Grotius' own admission, acquires the right to execute judgement *de iure*. The taxonomic re-classification of the VOC as a Corporate Sovereign invests the joint-stock company with the requisite degree of *auctoritas principis* necessary to legitimate *bellum iustum*.

The deeper discursive problem that Grotius faces is that a logically indispensable precondition of the Just War is the clear violation of a *positive* right. *Prima facie*, the illicit infliction of *iniuria* in a dispute between contending parties of inherently *unequal* legal status (the Iberian Principality opposed to the Dutch Corporation) would prove insufficient under any orthodox construction of *bellum iustum*. The discursive requirements for making out Just War in and of themselves go in no small way towards explaining the Grotian taxonomic classification of the High Seas as *extra commercium*; logical necessity requires that Grotius demonstrate that the infringement of a positive right enjoyed by the Dutch Company as a legal person occurred within a juridical space governed not by *ius gentium secundarium* but by both Providential and Natural Law. Even an otherwise orthodox neo-Thomist text such as the *Commentarius* exhibits the self-subvert-

310 Grotius, *Commentarius in Theses XI*, 263.

311 Which may not even qualify as a lawful category within neo-Thomism. Suarez, for example, expressly identifies the 'private' war with the duel; Francisco Suarez, 'A Work on the Three Theological Virtues: Faith, Hope and Charity—Divided Into Three Treatises to Correspond with the Number of Virtues Themselves', in id. *Selections From Three Works of Francisco Suarez, S.J. Volume Two: The Translation*, with Introduction by James Brown Scott (New York: Oceana Publications, 1962), 729–868 at 855–65. For Gentili, lawful war can only be war between rival sovereigns. See below, Chapter Seven.

312 Grotius, *De Indis*, 85.

ing logic of the dangerous supplement at precisely this point, private violence being sub-textually invested with the status of *ius naturale*.

The power to pass judgement is twofold: there is the power that derives from superiority and the power that stems from necessity. The power that derives from superiority is, I allow, a mark [of sovereignty] which can be distinguished from other marks. This, however, is not true of the latter, as may be explained thus: Man naturally has the right to defend himself, to recover his property, and demand payments of debts. But a private citizen does not, by virtue of this right, also possess the power to pass judgement, insofar [as] he has an overlord, for no private person can pass judgement in his own case... However, in the event that recourse to one's overlord is not possible, the individual receives a sort of right to pass judgement [*accipit quondam iudicandi potestatem*], that is, as far as is necessary for the just execution of his rights. This does not come about by force of positive law, but of natural law [*neque hoc sit vi legi positivae, sed legibus naturalis*], since this is a practice among all nations;³¹³ and there can be no doubt that if we imagined a state existing before positive law, then this would be the prevailing situation [*et non dubium est, si fingamus aliquem statum priorem iure positivo, quin eo statu ita res habuerit*].³¹⁴

Such a *statum priorem iure positivo* is, we may presume, *mare liberum extra commercium*. An additional layer of 'overlapping indeterminacy' operates here, the radical iterability between negative and positive categories each giving rise to respective sets of both 'strong' and 'weak' rights. As we would expect, *De Indis* migrates between these two poles; the alternating 'thickening' and 'thinning' of *ius naturale* is a rhetorical effect achieved precisely through this perpetual oscillation. *Res nullius*, governed by a relatively 'thin' ontology (determined by physical Nature) is the negative source of a 'strong' right prohibiting the unilateral enforcement of exclusionary title. However, this right is simultaneously 'weak' as it is potentially subject to reversal through the positive fulfilments of the material requirements of *occupatio duplex*. *Res communis*, governed by a relatively 'thick' ontology (a discursive shift 'backwards' toward Providence textually re-constituted as a legislator; herein, 'God' as a 'trope'³¹⁵) is the positive source of a

313 Or 'peoples'? '*Quia quod omnes gentes ita usurpatur*.'

314 Grotius, *Commentarius in Theses XI*, 245. In Art. 37 at 241, Grotius makes the intriguing comment that 'The right to wage war does not immediately derive from sovereignty, but from [one of] its marks.' This qualification, within a text premised upon the legality of public authority to wage Just War, may be an indication of Grotius' own realization of a potential inversion of categories at this point in his argument, allowing for a total breakdown of hierarchical distinction between Corporation and State.

315 Or, in Boyle's language, 'thick ontology' equating with 'deep normative order.' James Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', in Martii Koskeniemi, (ed.) *International Law* (New York: New York University Press, 1992), 121–53, *passim*.

‘strong’ right, but only within the comparatively narrow scope of *usus et fructus*. It is a ‘weak’ right in that it fails to provide grounds for a positive right of communitarian governance.³¹⁶

Although the ‘common’ property of all, the High Seas cannot be made the subject of a positive form of global governance by either *opinio iuris* or treaty, as to do so would implicitly legitimate a possible voluntary transference of communal rights over *extra commercium* to a potential *Universalis Monarchia*, or world-empire.

XIII *Imperium Contra Dominium*: The Logic of the Dangerous Supplement

The separation of *dominium* from *imperium* creates a ‘discursive opening’ within which a proprietary model of oceanic governance is permitted to operate. This textual construction, when practically combined with the institutional innovations and practices of the VOC, acts to legitimate a viable form of Corporate Sovereignty. With the successful inversion of the metaphysical hierarchy between *proprietas* and *iurisdictio*, the Company acquires the stewardship function of enforcing both *mare liberum* and *liberum commercium*, as a de facto legitimation of the ‘privatisation’ of international personality and authority; *mare liberum* as *extra commercium* discursively supersedes both *imperium* and *dominium*. This inversion of hierarchies is subsequently re-expressed through a series of acts of symbolic validation. Whereas Iberian States exercise *imperium* through the hierocratic territorialism of *Inter caetera*, the private actor of the merchant company ‘polices’ *mare liberum* as a true *res extra commercium*, fulfilling the *ius naturae* of global *societas* via *commercium liberum*. Precisely because it is the first ‘true’ hegemon, the United Provinces is in the anomalous situation of employing naval force to pre-empt rather than enforce maritime *dominium*. This rhetorical stratagem is, of course, magnificently circular. Since the VOC is lawfully empowered to conduct *bellum iustum* due to the absence of *imperium/dominium* over *mare liberum*, it must necessarily be invested with the requisite marks of sovereignty; because it does possess such marks (‘signs?’), the Company is able to exercise all sovereign functions compatible with its telos, including the waging of Just War and treating with East Indian principalities.³¹⁷

316 Contemporary authorities that consider Grotius as the progenitor of the UNCLOS regime or the contemporary doctrine of ‘The Common Heritage of Mankind’ are therefore exactly wrong on this basic point. See John J. Logue, ‘A Stubborn Dutchman: the Attempt to Revive Grotius’ Common Property Doctrine in and after the Third United Nations Conference on the Law of the Sea’, in T.M.C. Asser Institute (ed.), *International Law and the Grotian Heritage* (The Hague: T.M.C. Asser Institute, 1985), 99–108, *passim*; John Logue, ‘The Revenge of John Selden: The Draft Convention on the Law of the Sea in Light of Hugo Grotius’ Mare Liberum’, *Grotiana*, 3 (1980), 27–56, *passim*. The victory of ‘oceanic nationalism’ as enshrined in the Continental Shelf and Extended Economic Zone provisions signify the re-emergence of *mare clausum* at the expense of *mare liberum*. Ibid. 53.

317 See below, Chapter Seven.

Through his adroit reclassification of the categories of Property Law, Grotius facilitates the emergence of the sea itself as a subject of international legal discourse. This is achieved primarily through a continuous rhetorical ‘thinning’ of the relevant ontological categories. In substantive terms, the sea serves as the locus for the mainly a-historical principles of international solidarity and compromise (*res communis*), governed by the essential precepts of the customary Law of Nations and mediated through the Property Law category of *res communis*. In the British School perspective, *De Indis* serves as the medium for the emergence of the Grotian Heritage, the ‘solidarity, or potential solidarity, of the states comprising international society, with respect to the enforcement of the law.’³¹⁸ World-Systems Analysis view unveils a slightly different ‘reality’; the ‘privatisation’ of the State and the concomitant ‘publicization’ of the Company, both subject to international customary law, expresses an inherently violent and exploitative interstate hegemonic rivalry, discursively underpinned by an iterable ‘fluidity’³¹⁹ of Scholastic and Humanist principles. Purely in terms of discursive formation the logic of Grotius’ marine taxonomic system reached its *summa* during the London Conferences of 1613 and 1615, where Grotius successfully re-formulated Dutch claims to lawful trade monopoly within the East Indies not within terms of territory but in terms of enforceability of contract.³²⁰ *Pacta sunt servanda* and freedom of contract, both naturalist principles, also served as critical juridical innovations within the establishment of the autonomous private regime of *lex mercatoria*.³²¹ The wholesale substitution of contractual rights—in the case of the Dutch East Indies, binding and enforceable trade concessions—for territorial claims effects a two-fold transformation within International Law, one juridical and one institutional. On the one hand, the territorialist logic of world-empire was replaced rhetorically by the capitalistic reason of the World-Economy, regulated by commercial contract and the private law merchant. On the other hand, universalist Natural Law is substituted for positivistic Civic Humanism as both the conceptual and the normative foundation for the legal expression of the post-territorialist order, a ‘public’ order that, within the Dutch cycle of systemic accumulation, replicates on a global scale the foundational principles of private law and republican corporatism. Unifying both movements is the centrality of the iterable private/public joint-stock company as both the progenitor of naturalist international jurisprudence and the bearer and enforcer of these self-same sets

318 Hedley Bull, *The Anarchical Society*, 2nd edn (New York: Columbia University Press, 1995), 52.

319 Tuck’s ‘schizophrenia’.

320 This has been exhaustively discussed by Martine Julie van Ittersum in her *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (Leiden: Brill, 2006), 371–96.

321 Naturalist ‘canon law provided the source for the principle of *pacta sunt servanda*, or the binding force of promises, which were not enforceable under either Roman civil law or the common law of the period’ Cutler, *Private Power and Global Authority*, 117. See also, *ibid.* 117–18 and 151–61.

of natural rights. The corporatist discourse of the Grotian Moment directly prefigures the private international legal regimes of the trans-national Corporate Sovereignty of the US hegemonic cycle.

The centrepiece of the discursive stratagem of *De Indis*, at least so far as it pertains to *mare liberum*, lies within the divisibility of sovereignty; the iterable relationship between 'State' and 'Person' (or, conversely, 'public' versus 'private' property) as the co-equal bearers of 'marks of sovereignty' within International Law. The critical repercussions of the historical situating of *De Indis* within the wider discursive requirements of the VOC should not be underemphasised. The category of the 'State' itself is a wholly derivative construct, as it only acquires sovereignty/*dominium* pursuant to a prior voluntary conveyance of both right and title from the private to the public orders, understood as a corporate body.

Grotius' novel view of the matter rested on his equally novel assimilation of states and individuals, for there were in general no specifically political rights in Grotius' theory.³²² If an individual could not own something, he could not give his rights in it to a state; and since 'every right comes to the state from private individuals', a state could not have political control over unownable [sic] territory.³²³

Herein lies the 'unsustainable tension' at the heart of Grotian discourse; the project of establishing a comprehensive framework of international public order that is suborn to the global(ised) operation of private rights and interests. Although not given unlimited operational scope—as the de-legitimation of *Inter caetera* demonstrates—the Grotian Moment is expressly premised upon the privatisation of global authority through the international extension of (post-Suarez) property rights. As the operation of 'Law' always corresponds to the governance of a designated 'Polity'—*ubi societas, ibi ius*—the emergence of the World-Economy and its correspondent form of international public order require the presence of the international 'Rule of Law'. From the Grotian perspective, however, International Law must always be rendered consistent with the hegemonic requirements of both the Dutch Republic and the VOC. Here, a comparatively 'thin' ontology gives rise to a smaller number of positive substantive rights, alternately operating 'strongly' or 'weakly'. This serves as the positive expression of the logical corollary of the negation of the 'thick' Realist ontology underlining *in plenitudo potestatis*. Within *De Indis*, the High Seas are taxonomically reclassified as *extra commercium*, and the operational autonomy of the (nominalist) Nation-State is affirmed as against the (realist) supra-statist *imperium*.

The Grotian shift from Civic Humanism towards neo-Thomism discursively replicates the heterogenous logic of World-Systems Analysis, predicated upon the causal interdependence between intra- and interstate levels of analysis. Civic Humanism ideologically legitimated the local economic and political conditions

322 Contra the 'Common Heritage of Mankind'.

323 Tuck, *The Rights of War and Peace*, 92. For 'unownable' I would read 'extra-prescriptive'.

of the early Dutch Republic, while Late Scholasticism corresponded to the practical realities of the emergent interstate system. *De Indis* appropriates Natural Law to effect the discursive replacement of *imperium* by *dominium* as the legitimation of the jurisdictional regulation of trans-national space(s), apologetic *proprietas* now invested with utopian normative force. The strict monism of Civic Humanism, however, ultimately rendered it incompatible with the heteronomy of the World-Economy.³²⁴ Holland's emergence as the first 'true' hegemon—the statist bearer of 'surrogate government'—required the juridical legitimation of the States-General's investiture of *dominium/proprietas* with a de facto 'jurisdictional' function, institutionally embodied within the VOC. Simultaneously, the 'fracturing' of trans-national space through the anti-Hieratic shift from a 'thick' to a comparatively 'thin' ontology, serves as the necessary discursive precondition for the wholesale replacement of a 'strong' monistic space with a 'weak' dualistic plurality, simultaneously governed by *ius naturale* and Divisible Sovereignty. The resulting fracture, in turn, permits the 'filling' of international space with a series of meta-analogical property relationships. The critical issue now becomes the role of both neo-Thomism and Civic Humanism in the formation of the Grotian 'theory' of Legal Personality and the 'privatisation' of international authority.

324 See Below, Chapter Five.

Chapter Five

Trace (I)/Respublica: Apologia and Humanism

All significant concepts of the modern theory of the state are secularised theological concepts, not only because of their historical development... but also because of their systematic structure.

(Carl Schmitt)

The interpretative key of *De Indis* is the micro-oscillation between contrasting ontological variants of *ius naturale*, the ‘thick’ or descending form epitomised in Late Scholasticism and the ‘thin’ or ascending form exemplified by Civic Humanism. It is the repetitive migration between the two poles that accounts for the signature characteristic of Grotian discourse. At first glance Grotius appears to break with Scholasticism by inaugurating a new form of international law based on a Humanist secularism, an interpretation that is ultimately belied by a close critical reading. Civic Humanism, in fact, constitutes the ‘repressed’ pole of the Text, its strategic subordination to the ‘dominant’ pole of neo-Thomism enabling Grotius to maintain a sustained tension between the two discourses. A sub-textual impression, almost ‘subliminal’ in nature, of simultaneous secularist innovation *and* theological continuity is achieved thereby. The critical variable is the ‘lurking presence’ of Late Scholasticism as the privileged pole of *differance*. In both this chapter and the next, I shall be discussing Dutch Republicanism in terms of both an historically and discursively necessarily relationship to both Corporatism and Natural Law. I have already discussed the status of the VOC as a corporate person in Chapter Four; here I will be discussing in more explicit at greater length the direct relationship between the Corporation and the Naturalist theory of Just War, both in intra-state and inter-state terms. In terms of Natural Law, the primary focus of this chapter, I will be framing the discussion of the intra-state constitutionality of the Dutch Republic in terms of the republican concepts of ‘checks and balances’, especially with regard to the issues of sectarianism and religious toleration, and Federalism, the political economy of the Dutch State within the Modern World-System has being necessarily grounded upon con-federalist principles.

I 'Thin' Ontology: *Civitas*

The emergence of Civic Humanism as an autonomous juro-political discourse was inseparable from the collapse of the European world system and the subsequent hegemonic transition signified by the 'Italian Wars' (1494–1527). The heterogeneous logic of Divisible Sovereignty facilitated the direct operation of the Capitalist World-Economy on both the intra- and interstate levels. The encroachment into the core zone of the Mediterranean sub-system by the territorialist powers led to a full-scale political crisis within the pre-statist Italian communes; because 'the emperor's or the pope's claim to ultimate sovereignty remained valid in law, [the communes] should be seen as existing within a peculiarly medieval hierarchy of sovereignty in which ultimate and legitimising authority lay with their legal overlord.'¹ The extended struggle over *monarchia universalis* provoked a radical innovation in communal political culture, labelled by Pocock as 'the Machiavellian Moment'.² Centred upon the practical political requirements of *Civitas* (alternatively, 'the Republic'/*res publica*),³ 'the Machiavellian Moment' signified a heightened self-reflexivity in juro-political theory: 'the Republic was seen as confronting its own temporal finitude, as attempting to remain morally and politically stable in a stream of irrational events conceived as essentially destructive of all systems of secular stability.'⁴

Beyond a nascent Republicanism, however, Civic Humanism defies exhaustive description: 'Humanism may most conveniently be defined as a group of disciplines based on the study of the literature of the ancient world and concentrating on grammar, rhetoric, history and moral philosophy.'⁵ Civic Humanism consisted of an inherently unstable combination of two diverse and possibly irreconcilable domains of enquiry. The first was Philosophy; although Civic Humanism

1 J.P. Canning, 'Introduction: Politics, Institutions and Ideas', in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), 341–66 at 351.

2 J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), 58–66; Eugenio Garin, *Italian Humanism: Philosophy and Civic Life in the Renaissance*. (Oxford: Basil Blackwell, 1965), 3–77. For Grotius' Civic Humanist background, see Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), 155–69.

3 Nicholas Greenwood Onuf, *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998), 63–6.

4 Pocock, *The Machiavellian Moment*, viii. Within the political context of the Italian Renaissance, this is best highlighted by the 'Italian Wars' of 1494–1527. See above, Chapter Three.

5 Canning, 'Introduction', 366. In what follows, my focus will be on secularist Civic Humanism and not on the complicating and controversial notion of *Christian* Humanism.

was strongly influenced by Late Scholasticism,⁶ it tended to exhibit a marked preference for the substantive concerns of neo-Aristotelianism⁷ and Roman Late Stoicism.⁸ The second, and more dominant strand was Rhetoric, emphasising a wholly instrumentalist approach to Philology and Apologetics.⁹ Aristotle defines Rhetoric as ‘the counterpart of dialectic’;¹⁰ the science of ‘detection of the persuasive aspect of each matter.’¹¹ Constituting a form of *techne*, or ‘practical reasoning,’¹² Rhetoric operates exclusively within secular social and political space, eschewing any coherent metaphysical concern with or re-presentation of Being. As such, it avoids the ‘thick’ ontological entanglements of the Dialectic.

Let rhetoric be the power to observe the persuasiveness of which any particular matter admits. For of no other art is this the function; each of the others is instructive and persuasive about its special province, such as medicine about healthy and diseased states, geometry about the accidental properties of magnitudes, arithmetic about numbers, and so on with the other arts and sciences. By contrast, rhetoric is considered to be capable of intuition of the persuasiveness of, so to speak, the *given*. That is why we assert that its technical competence is not connected with any special, delimited kind of matter.¹³

The close relationship of anti-metaphysical Rhetoric to secularist Civic Humanism places the latter within the domain of ‘thin’ ontology, obviating any possible dialectical speculation concerning the nature of self-grounding Being. Accordingly, the more that Civic Humanism constituted a series of purely rhetorical

6 Quentin Skinner, *The Foundations of Modern Political Thought. Volume One: The Renaissance* (Cambridge: Cambridge University Press, 1978), 49–65.

7 Ibid. 3–26.

8 Jerrold E. Siegel, *Rhetoric and Philosophy in Renaissance Humanism: The Union of Eloquence and Wisdom, Petrarch to Valla* (Princeton: Princeton University Press, 1968), 3–30.

9 Skinner, *The Foundations of Modern Political Thought. Volume One: The Renaissance*, 27–48 and 84–112; Siegel, *Rhetoric and Philosophy in Renaissance Humanism*, xi–xvii, 226–62; Bernard Guenee, *States and Rulers in Later Medieval Europe* (Oxford: Basil Blackwell, 1985), 36–7. Nevertheless, Rhetoric was held to play an indispensable role in *civitas*. ‘Above all, [civic life] was done through dialogue, the dual activity of speaking and listening, so that rational conclusions might emerge. It made for a dynamic relationship, open-ended and uncertain in its conclusions.’ H.R. Koenigsberger, ‘Republicanism, Monarchism and Liberty’, in Robert Oresko, G.C. Gibs and H.M. Scott (eds), *Royal and Republican Sovereignty in Early Modern Europe* (Cambridge: Cambridge University Press, 1997), 43–74 at 44.

10 Aristotle, *The Art of Rhetoric*, trans. with Introduction by H.C. Lawson-Tancred (Harmondsworth: Penguin Books, 1991), 66; see also, 65–82.

11 Ibid. 70.

12 H.C. Lawson-Tancred, ‘Introduction’, in Aristotle, *The Art of Rhetoric*, 1–61 at 16.

13 Aristotle, *The Art of Rhetoric*, 74.

performances or stratagems, the 'thinner' its ontological discourse became. The philosophical concern of Civic Humanists was 'towards the problems of civic life', the purely secular 'arts by which men may live well and the *sapiential* which teaches how man may achieve perfection while still in this life.'¹⁴ The shift away from the 'thick' ontological ground of Late Scholasticism is inseparable from the foregrounding of Rhetoric, the keystone of a new but ontologically 'thinner' mode of anthropocentrism; the dominant theme of philosophical Humanism 'was the centrality of man, which was reinforced by the preference given to techniques favouring communication and persuasive methods, such as the dialogue, the epistle and the oration', or the *oratio*.¹⁵ Jardine has amply demonstrated that the literary criticism and rhetorical stratagems of Humanism, in a manner not at all dissimilar to that of contemporary Deconstruction, provides the mean for new manners of logical demonstration, centred not the 'formal validity' of the syllogism but the 'informal validity' of non-deductive inference, or 'argument'.¹⁶

A humanist treatment of logic is characterised by the fundamental assumption that *oratio* may be persuasive, even compelling, without its being formally valid (or without the formal validity of the argument being ascertainable). It takes the view, therefore, that any significant study of argument (the subject-matter of logic/dialectic) must concern itself equally with argument (strictly, argumentation) which is compelling but not amenable to analysis within traditional logic. It is this fundamental difference of opinion over what is meant by 'compelling' argument which accounts for the dogmatic insistence (on ideological grounds) of the scholastic (and the historians of scholasticism) that the humanist is a 'grammarian' or a 'rhetorician'. Either term announces that what the humanist is concerned with is not 'rigorous' in the restricted scholastic sense: all discourse not amenable to such 'rigorous' analysis is, for the scholastic, a matter for the grammarian (to parse and construe) or the rhetorician (to catalogue its persuasive devices). It is in the same spirit that humanists always refer to their study of ratiocination as 'dialectic' (reasoning conducted between two interlocutors), rather than as 'logic', to emphasise the active, pragmatic nature of the argumentation which captures their interest.¹⁷

What is at stake here is the successful negotiation of Presence. The 'peril' of Civic Humanism is that it is still grounded in Natural Law and a broad, but weak, Aristotelian teleology. Yet, if it moves in the direction of an explicitly Christian form—Catholic or Protestant—it risks re-invoking the 'thick' ontology that un-

14 Cesare Vasoli, 'The Renaissance Concept of Philosophy', in Charles B. Schmitt, Quentin Skinner, Eckhard Kessler and Jill Kraye (eds), *The Cambridge History of Renaissance Philosophy* (Cambridge: Cambridge University Press, 1988), 57–74 at 63.

15 Ibid. 62.

16 Lisa Jardine, 'Humanistic Logic', Charles B. Schmitt, Quentin Skinner, Eckhard Kessler and Jill Kraye (eds), *The Cambridge History of Renaissance Philosophy* (Cambridge: Cambridge University Press, 1988), 173–98, *passim*.

17 Ibid. 176–7.

derlines Scholasticism and neo-Realism and which imperils the newly found anthropocentrism which acts as the template for Humanist discourse. Civic Humanism is riddled with tension, which served as the constant impetus to move towards a 'thicker' ontology, less anthropocentric but better 'grounded'.

The humanists wished religiosity to rely principally on the individual's inner assurance of faith and to be experienced as a continuing meditation on man's transcendent destiny. So, though scholastic distinctions and divisions were rejected, the very conception of philosophy was changing because its chief object was now man—man was at the centre of the enquiry—and because the direct appeal to classical models demanded the rejection of traditional epistemological methods. Even the humanist insistence on rhetoric and its techniques implicitly emphasised a profound questioning of values. In this process philosophy was stripped of its ahistorical character and swept up in the transience and mutability of human existence.¹⁸

Both domains of Civic Humanism, therefore, were marked by an overriding concern with the two concepts central to the 'transience and mutability of human existence': *libertas*, which could signify either political autonomy in general or republican self-government in particular,¹⁹ and *habitus*, Man's universal but secularly grounded 'dispositional nature'.²⁰ Although it could also 'double' as a monarchist concept, *libertas* broadly corresponded to the republican tradition.²¹ Difficult to define, *libertas* can best be expressed as the sign of 'natural rights and liberties'; republican writers 'generally assume that the freedom or liberty they are describing can be equated with—or, more precisely, spelled out as—the unconstrained enjoyment of a number of specific civil rights'.²² The substantive content of these 'specific civil rights', however, remain somewhat indeterminate. At the very least, *libertas* signified autonomy or political independence, the republican constitution acting as the sign of the *civitas libera*, 'the excellency of the free state'.²³ Autonomy could operate on both the collective and public level as well as on the individual and private. In the public domain, *libertas* is equated with republican constitutionality, guaranteeing some form of majoritarian consensus, the rule of law, and the suspension of factionalism,²⁴ participatory government,²⁵

18 Vasoli, 'The Renaissance Concept of Philosophy', 61.

19 Skinner, *The Foundations of Modern Political Thought. Volume One: The Renaissance*, 69–84.

20 Cary J. Nederman, 'Nature, Ethics and the Doctrine of *Habitus*: Aristotelian Moral Psychology in the Twelfth Century', *Traditio*, 45 (1989–90), 87–110, *passim*.

21 Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998), 55 fn. 176, 177 and 178.

22 Ibid. 18.

23 Ibid. 23–6.

24 Ibid. 27–9.

25 Ibid. 30–2.

and the delegation of political power to representative institutions.²⁶ In the private domain, the presence of *libertas* can most simply be defined as the absence of 'slavery' (*servitus*), either as formal legal coercion or informal social dependency; 'the essence of what it means to be a slave, and hence to lack personal liberty, is thus to be *in potestate*, within the power of someone else.'²⁷ The issue of bonded labour and social dependency is obviously a matter of central concern to Civic Humanists as Aristotle placed enslaved labour at the centre of the political economy of the *civitas*, ideologically legitimated by the teleologically grounded doctrine of 'natural' slavery.²⁸ There is, therefore, a direct correspondence between private and public forms of civil liberty,²⁹ the *libertas* of the individual secured through the freedom of the *civitas*, both in terms of the absence of foreign domination and by the presence of republican constitutional government.

The use of force without right is always one means of undermining public liberty. [Republican] writers are no less insistent, however, that a state or nation will be deprived of its liberty if it is merely subject or liable to having its actions determined by the will of anyone other than the representatives of the body politic as a whole. It may be that the community is not as a matter of fact governed tyrannically; its rulers may choose to follow the dictates of the law, so that the body politic may not in practice be deprived of any of its constitutional rights. Such a state will nevertheless be counted as living in slavery if its capacity for action is in any way dependent on the will of anyone other than the body of its own citizens.³⁰

The great unresolved question of Republicanism is whether *libertas*, or 'freedom' more generally, is to be constituted in positive or negative terms; at the very least, republican writers possessed a clear theory of negative liberty.³¹

26 Ibid. 32–6.

27 Ibid. 41. Pocock has formulated the problem of slavery in terms of a strict hierarchy of *differance*: the presence of dependency is the absence of *libertas*.

To become the dependent of another was as great a crime as to reduce another to dependence on oneself. The dereliction of one citizen, therefore, reduced the other's chances of attaining and maintaining virtue, since virtue was now politicised; it consisted in a partnership of ruling and being ruled with others who must be as morally autonomous as oneself. In embracing the civic ideal, therefore, the humanist staked his future as a moral person on the political health of his city.

Pocock, *The Machiavellian Moment*, 75.

28 Aristotle, *The Politics*, Revised Translation by Trevor J. Saunders (Harmondsworth: Penguin Books, 1981), 62–75.

29 Skinner, *Liberty Before Liberalism*, 36–57. For the role that Aristotelian natural slavery and Civic Humanism played in the dispossession of indigenous peoples in the West Indies, see below, Chapter Eight.

30 Ibid. 49.

31 Ibid. 82–3.

The critical feature that distinguished Civic Humanism from Late Scholasticism was the systemic shift towards a self-consciously 'thin' ontology, as signified by both the substantive and rhetorical development of *libertas* and *habitus*.³²

The chief innovation of late medieval thought was the development of the secular state as a product of man's political nature... Although the idea of nature and natural law were prevalent before the influx of Aristotelian works from the mid-twelfth century onwards, the rediscovery of Aristotle injected a new conception of nature into medieval philosophy: above all it provided an apparently complete and systematic naturalistic view of the world, the heaven's and man's life and purpose. Indeed, man's nature was defined as being specifically political. Previously, nature had been seen in terms of divine creation, which had facilitated [the Thomists'] identification of natural law with divine law. Aristotle presented a view of nature which did not depend on creation by God.³³

Despite the Thomistic enthusiasm for Aristotelianism, late medieval theology never invested *habitus* with discursive significance; the strong Realism of Hierocracy logically mandated a 'thick' ontology.

A full-scale Aristotelian naturalism did not... emerge in late medieval political thought: God remained in the background as the creator of the natural world. The adoption of Aristotelian concepts did, however, permit the different aspects of men's life to be treated in specific categories. Thus political life could for all practical purposes be considered within a purely natural political domain.³⁴

A 'thin' Aristotelian ontology underpinning both *habitus* and *libertas*, however, would prove invaluable to any polity engaged in both ideological and political struggle against *monarchia universalis*.³⁵ In this way, both the United Provinces and the Italian communes, most notably Venice, formed a 'discursive dynad'.³⁶

32 With regards to *habitus*, as with all things republican, the influence of Machiavelli proved vital.

Certainly we can discover areas of [Machiavelli's] thought where he seems to have radically departed from the medieval concept of a teleologically determined human nature, though equally there are moments at which he seems to be using, if he does not formally reason from, the idea that men are formed to be citizens and that the reformation of their natures in that direction may be corrupted but cannot be reversed; the prince cannot make them anything else. But it is of some significance that the revolutionary aspects of his thinking—those in which man appears most dynamic and least natural—did not arrest the attention of his friends.

Pocock, *The Machiavellian Moment*, 316–17.

33 Canning, 'Introduction', 360–1.

34 Ibid. 361. See Nederman, 'Nature, Ethics and the Doctrine of *Habitus*', *passim*.

35 For republicanism as secularism, or 'thin' ontology, see Pocock, *The Machiavellian Moment*, 53–4.

36 See *ibid.* 66–76 for Aristotelianism as basis for Civic Humanism. Aristotle's *Politics* 'offered a paradigm of how a body politic might be held together when it was

This point was not lost in Grotius, who himself was thoroughly immersed in the literature of Civic Humanism. In a 1599 dedicatory epistle to the Venetians, Grotius recounted the content of an earlier conversation with Venice's ambassador to the French court, Fransisco Contarini.

I met him as he was talking extensively with our delegates, Nassau and Oldenbarnevelt, and the occasion arose somehow to discuss the profound similarity... between our two republics—something marvellous to your people and ours. I instanced not only the great equality and liberty in public affairs to be found in each of them, and their rejection of tyranny, but also the form of the states, a liberal constitution much like that which has been praised by writers on the best kind of state. I compared in some detail what we knew about these aspects of the republic, and I concluded that they were as alike as two bowls of milk or (as they say) one sheep is to another... Thus anyone would do you an injury, or bring dishonour upon you, who would join you with others rather than us, and assuredly, it would be thought an honour to our [Dutch] states, to compare them with your outstanding republic—far and away the best of all states.³⁷

A love for all things Venetian necessarily equated with patrician sensibilities.³⁸ The legacy of the 'myth of Venice' provided the Civic Humanist pole of the discursive framework within which Grotius had to negotiate the contradictory elements of both intra- and interstate formation. This is, in fact, perfectly consistent with the backward reaching 'double movement' between the Genoese and Dutch cycles of systemic accumulation previously discussed in Chapter Three; as hegemon, Holland replicated the organisational and institutional innovations of Venice rather than Genoa. Within Venetian political discourse, as within the political discourse of the Italian Renaissance more widely, Civic Humanism was broadly understood to correspond to a specifically Aristotelian—meaning secular—Republicanism, predicated upon a hybrid Aristotelian/Polybian concept of the 'mixed constitution' (*respublica mixta*)³⁹ and a correspondingly 'thin' ontology.⁴⁰ Civic Humanist authorities, such as the anti-teleological Machiavelli, were preoccupied with overcoming corruption (*corruzione*) and political factionalism through integrative civic participation (*virtu*), the fatal structural defect of the city-state system

conceived, as an Italian commune must be, as a city composed of interacting persons rather than of universal norms and traditional institutions.' Ibid. 74. Here, 'traditional institutions' refers to *monarchia universalis*.

37 Cited in Tuck, *Philosophy and Government 1572–1651*, 159. For Grotius' Civic Humanist background, see ibid. 155–69: 'The young Grotius was an ideal humanist.'

38 'In Venice itself the tendency was to judge the aristocratic character of the state permanent, regardless of the particular interpretation given its constitution.' Eco O.G. Haitsma Mulier, *The Myth of Venice and Dutch Republican Thought in the Seventeenth Century* (Assen: Van Gorcum, 1980), 17.

39 See below, this chapter.

40 Pocock, *The Machiavellian Moment*, 316–17.

being the self-destructive subordination of the public good to private interest.⁴¹ In an intriguing aside, Pocock has suggested that 'it is possible—though debatable—that power in the face-to-face polis must be so far dispersed and personal as to render difficult the growth of theory about the several specialized ways of exercising it.'⁴² In this respect the organisational revolution of the Genoese ultimately proved self-destructive; the hyper-privatised and individualistic nature of the Banco di San Georgio hopelessly fragmented and privatised the political decision-making machinery of the *stato*.⁴³ Instead, contemporaries looked to self-stabilising Venice, the *serenissima repubblica*, as the model for the solution of the 'problem' of internal political conflict and decay.

Although it is technically beyond the scope of the present volume, I would like to offer the following suggestion that will shape the discussion for the remainder of this chapter. I argue that there is a deeper historical connection operating here that historians of ideas such as Pocock have failed to detect, one that is linked to the relative neglect paid to corporatist philosophers such as Althusius. I have already established the fact that the Venetian political and economic system were premised upon a stringently corporatist model of political and legal identity. It may very well be the case that a specifically corporate form of Republicanism was what was required to resolve the recurrent crises of factionalism and instability that plagued the 'long' 16th century. In his seminal work *The Machiavellian Moment* Pocock plots the trajectory of republican discourse from the TimeSpace parameters of the Mediterranean world system to the Atlantic World-System, anchoring his discussion on the comparative case studies of Lombardy and Great Britain. Completely missing from his account is any discussion of the United Provinces (Grotius) or northern Germany (Althusius).⁴⁴ I believe that a vital 'missing link' within Pocock's narrative is the fact that Holland's hegemonic cycle

41 Ibid. 272–330.

42 Ibid. 320.

43 Guido A. Ferrarini, 'Origins of Limited Liability Companies and Company Law Modernisation in Italy', in Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds), *VOC 1602–2002: 400 Years of Company Law* (GA Deventer, Kluwer Legal Publishers, 2005), 187–215 at 193–5. See above, Chapter Three.

44 Martin van Gelderen, 'The Machiavellian Moment and the Dutch Revolt: the Rise of Neostoicism and Dutch Republicanism', in Gisela Bock, Quentin Skinner and Maurizio Viroli (eds), *Machiavelli and Republicanism* (Cambridge: Cambridge University Press: 1990), 205–23, *passim*. On the post-Machiavellian parallels between Grotius and Althusius, see Martin van Gelderen, 'Aristotelians, Monarchomachs and Republicans: Sovereignty and *respublica mixta* in Dutch and German Political Thought, 1580–1650', in Martin van Gelderen and Quentin Skinner (eds), *Republicanism and Constitutionalism in Early Modern Europe* (vol. i of *Republicanism: a Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 195–217 at 199–207. For a useful general overview of the constitutional parallels between the German Empire and the Dutch Republic, see Olaf Mörke, 'The Political Culture of Germany and the Dutch Republic: Similar Roots, Different Results', in Karel Davids and Jan Lucassen (eds), *A Miracle Mirrored: The Dutch*

was grounded upon the ‘double movement’ replication of Venetian republican Corporatism, yielding a degree of organisational innovation and institutional stability that played a decisive role in propagating the republican model of constitutional governance throughout the 17th and 18th centuries. In terms of juro-political discourse, this ‘double movement’ textually equated with a ‘double discourse’. On the one hand, the individualism of the Italian variant of Civic Humanism was reformulated in terms of a specifically republican Corporatism. On the other hand, there was an almost sub rosa migration to the repressed pole of the ‘thick’ ontology of Late Scholasticism and Natural Law. No less for the 17th century than for the 21st, as Koskenniemi has shown, Republicanism logically requires a strong form of *ius naturale* upon which to ontologically ground *libertas*, even if only on the ‘unconscious’ or sub-textual level. Without recourse to Natural Law there is no inherent a priori limitation upon either the legislative or prescriptive power of the *civitas*; a Civic Humanism that exclusively orbits the pole of ‘thin’ ontology cannot serve as the self-grounding foundation of liberty.⁴⁵

II The ‘World-city’: Dutch Hegemony and *De Indis*

For Braudel, a world economy ‘always has an urban centre of gravity, as the logistic heart of its activity.’⁴⁶ For every regional sub-system there is a *super-ville*, or ‘world-city’, that spatially grounds the mercantile and commercial networks of that system.⁴⁷ With the global transforation of the European sub-system into the Capitalist World-Economy over the course of the ‘long’ 16th century, the historically privileged world-city of the relevant cycle of systemic accumulation—Amsterdam, London, New York—was able to successfully project its networks outwards into global space, effectively subordinating the other urban zones of the Capitalist World-Economy into an intensely regulated state of hierarchical dependency.⁴⁸ What is crucial here is the manner in which the primacy of the world-city contributed to the overall success of the hegemon within its respective cycle of systemic accumulation, The ‘true’ hegemon is the most successful capitalistic Nation-State that is historically able to effectively re-align the insti-

Republic in European Perspective (Cambridge: Cambridge University Press, 1995), 135–72, *passim*.

45 On the practical applicability of these insights to the English constitutional crisis of the early 1640s, see Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994), 64–76. See in general Johannes Althusius, *The Politics of Johannes Althusius*, trans. with Introduction by Frederick S. Carney (Boston: Beacon Press, 1964).

46 Fernand Braudel, *The Perspective of the World* (New York: Harper & Row, 1984), 27.

47 Ibid. 27–35.

48 ‘By the time Amsterdam and London took the stage, the world-cities possessed the whole panoply of means of economic power; they controlled everything, from shipping to commercial and industrial expansion, as well as the whole range of credit.’ Ibid. 35.

tutional and organisational features of the World-System so as to maximise the efficacy and stability of the Capitalist World-Economy; as Braudel argues, it is as if 'the *centralization* and *concentration* of wealth and resources necessarily favoured certain chosen sites of *accumulation*.'⁴⁹ In this way, the economic and political structure of the world-city effects the wider practical re-organisation of the Modern World-System via the effective monopolisation and exploitation of political and economic structural power.

If one were to super-impose the textual frame of *De Indis* upon the material grid of the European world system, one would find a near-perfect correlation. Like the republic of Venice, the world-city primacy of Amsterdam, embedded within the 'national' autonomy of the United Provinces, vitally depended upon an equalising balance of power relationship among the Spanish on the one hand, and the French and the English on the other.⁵⁰ Even more important were the political and constitutional parallels between the two republican oligarchies; in 1611, a Venetian traveller to Holland remarked that Amsterdam 'was the mirror-image of the early days of Venice.' The structural parallels between Venice and Amsterdam⁵¹ served as the template for the diffusion of Civic Humanism from the maritime republics of the Mediterranean to the North Atlantic. It is no coincidence that all three of the 'true' hegemons—the United Provinces (1609–c.1740), the UK (1815–1945), and the USA (1945–?)—all underwent relatively successful 'bourgeois revolutions' that installed either a republican government, or, in the alternative, a politically weak constitutional monarchy, the 'crowned

49 Ibid. 36.

50 Ibid. 31:

The history of humanist political thought before about 1620... can almost be told exclusively from the two urban centres of Europe, Italy and the Netherlands... It was in these two areas above all that the central political problem of the late sixteenth century was confronted and experienced *as* a problem: the phenomenon of the Spanish hegemony.

51 J.W. Smit, 'The Netherlands and Europe in the Seventeenth and Eighteenth Centuries,' in J.S. Bromley and E.H. Kossman (eds), *Britain and the Netherlands in Europe and Asia* (New York: St. Martin's Press, 1968), 13–36, *passim*. In Humanist literature, Venice was invariably cited as the exemplar of 'the myth of Polybian stability.' Pocock, *The Machiavellian Moment*, 271. See below, this chapter.

republic.⁵² Republicanism, premised upon anti-factional⁵³ ‘checks and balances’⁵⁴ and the constitutional restraint upon armed force,⁵⁵ proved indispensable to the juro-political requirements of the emergent urban capitalist patriciates of the United Provinces.⁵⁶ This complex panoply of juro-political innovation, in turn, were encapsulated within the archetypal republican conception of the ‘mixed

52 Perry Anderson, *Lineages of the Absolutist State* (London: Verso, 1974), 11 and 142. In what follows, I shall be omitting any consideration of whether American Republicanism was ‘classical’ or ‘liberal’. See Zuckert, *Natural Rights and the New Republicanism*, 159–64. My focus will be almost wholly upon seventeenth-century Dutch Republicanism, which operates predominantly within the wider tradition of ‘Aristotelian Republicanism’.

53 Martin van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590* (Cambridge: Cambridge University Press, 1985), 279 and 79.

Faction and foreign conquest were the existential threats to liberty... According to republican theory, in order to protect the community against internal divisions, a proper set of laws and ordinances was needed which bridled the ambitions of factions and prevented any faction from dominating the will of the community. In general, republican theorists felt that the best form of government to preserve concord and thereby liberty was a mixed form of elective government.

Hence, the Dutch patriciate deliberately modelled itself upon its Venetian counterpart. ‘In general, the Venetian patriciate managed to show the outside world a remarkably serene and unified visage. Though disagreements might well run deep, they never reached the point where real opposing parties formed. And that result was just what the republic’s political system was intended to achieve.’ Haitsma Mulier, *The Myth of Venice and Dutch Republican Thought in the Seventeenth Century*, 54; see *ibid.* 54–76, *passim*. See also E.H. Kossman, ‘Freedom in Seventeenth-Century Dutch Thought and Justice’, in Jonathan I. Israel (ed.), *The Anglo-Dutch Moment: Essays on the Glorious Revolution and Its World Impact* (Cambridge: Cambridge University Press, 1992), 281–98, *passim*.

54 Van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590*, 262–3:

During the Revolt an ideology of the Dutch political order and of political resistance was developed which celebrated liberty, arguing that in the Low Countries freedom was protected by a political framework which was based on the principle of popular sovereignty and functioned through fundamental constitutional guarantees, and representative institutions and virtuous citizens who were the guardians of liberty... An essential element of the idea of liberty was the emphasis on the inseparability of the liberty of the country and the personal liberty of its inhabitants.

See below, this chapter.

55 Pocock, *The Machiavellian Moment*, viii.

56 Scholars such as Heller and Onuf regard ‘the Machiavellian Moment’ as the harbinger of modern juridical discourse. ‘Liberalism and positivism together emerged [out of early republicanism] as modernity’s definitive construction of a world in which rational beings had not only escaped the weight of the past, but also exercised more control over nature and the future.’ Onuf, *The Republican Legacy in International Thought*, 114. See Thomas C. Heller, ‘Structuralism and Critique’, *Stanford Law Review*, 36 (1987), 127–98 at 149.

constitution.⁵⁷ The mixed constitution within the republican discourse of the 'long' 16th century was derived in equal measure from two classical authorities, the philosopher Aristotle (384–322 BCE) and the historian Polybius (c. 200–118 BCE). Although Worden has (tentatively) identified two disparate forms of Republicanism within the English national context—'constitutional' and 'civic'—both the constitutional and civic ('moral') dimensions co-exist within a more generic or 'free-floating' republican discourse; both strands are clearly exhibited and co-joined within both the Aristotelian and Polybian sources.⁵⁸ The overriding and unifying political concern of both classical authorities is their opposition to tyranny. What is most intriguing for the contemporary reader is that the notion of tyranny, or despotism, is not identified as an inherent characteristic of a particular kind of political system, such as Fascism, but is held to result from an 'extremity' or 'imbalance' within any form of government. For Aristotle

[T]yranny is a compound of extreme oligarchy and democracy. This is precisely what makes tyranny most hurtful to the ruled; it is made up of two bad types and contains the deviations and errors that derive from both... [With democracy the] tyrant springs from the people, from the populace, and directs his efforts against the notables, to the end that the people may not be wronged by them. This is clear from the record; for it is generally true to say that tyrants have mostly begun as demagogues, being trusted because they abused the notables... [With oligarchy] Tyrannies have also come into being when oligarchies have chosen one man and invested him with sovereign powers in the highest offices.⁵⁹

Later on in Book V of *The Politics* Aristotle reiterates this point concerning the point of the universal potential for tyranny within the nature of political activity itself.

That tyranny has the disadvantages of both democracy and oligarchy is clear. From oligarchy it derives two things: (1) The notion of wealth as the end to be pursued (certainly wealth is essential to it, as it provides the only way of keeping up a bodyguard and a luxurious way of living), and (2) mistrust of the populace; hence it deprives them of weapons, harms the common crowd and relegates them from the city to live in scattered communities. These features are common to oligarchy and tyranny. From the democracy is derived hostility to the notables, whom the tyrant brings low by open methods or secret, and sends into exile as being rivals and hindrances to his rule. These,

57 Haitsma Mulier, *The Myth of Venice and Dutch Republican Thought in the Seventeenth Century*, 15–25.

58 Blair Worden, 'Republicanism, Regicide and Republic: The English Experience', Martin van Gelderen and Quentin Skinner (eds), *Republicanism and Constitutionalism in Early Modern Europe* (vol. i of *Republicanism: a Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 307–27 at 307–8.

59 Aristotle, *The Politics*, 334–5.

of course, are the people who all originate plots for his overthrow, some themselves wishing to be rulers, others not to submit like slaves.⁶⁰

Polybius takes a similarly universalist approach, declaring that each 'constitution possesses its own inherent and inseparable vice. Thus in kingship the inbred vice is despotism, in aristocracy it is oligarchy, and in democracy the brutal rule of violence, and it is impossible to prevent each of the kinds of government... from degenerating into the debased form of itself.'⁶¹ If we are correct in identifying the presence of a specifically Aristotelian form of Republicanism, then two features of this particularist discourse become immediately outstanding. Firstly, the pre-occupation with *libertas* is rhetorically inseparable from a commensurate concern with slavery; both exist in a strictly reversible hierarchy of *differance*. Within Aristotle's teleology, the 'purpose' of the *civitas*, which is the realisation of the nature of man as a 'political animal' (*zoon politikon*), is best achieved through a form of government that guarantees both political and social health, dependent upon the presence of freedom and liberty. For Pocock, Civic Humanism is 'a style of thought... in which it is contended that the development of the individual toward self-fulfilment is possible only when the individual acts as a citizen, that is, as a conscious and autonomous participant in an autonomous decision-taking community, the polis or community.'⁶² (In a corresponding manoeuvre, the social category of 'natural slavery' is to reserved exclusively for those who are inherently unfit for integrative civic life.) Secondly, political activity and the process of constitutional function are predicated upon the transparently 'thin' ontological foundation of *habitus*: constitutional success or failure is the direct result of purely secular, or profane, political activity. As a result, any given political order is reflective not of Natural but of 'civil', or Positive Law (*ius civile*). Aristotle makes this point explicitly in Book VI of *The Politics*.

The task confronting the lawgiver, and all who seek to set up a constitution of [a particular] kind, is not only, or even mainly, to establish it, but rather to ensure that it is preserved intact. (Any constitution can be made to last for a day or two.) We should therefore turn back to our previous inquiries into the factors which make for the continued preservation of a constitution and those which make for its dissolution. On this basis we shall try to provide for stability: we shall be on our guard against those features which we find to be destructive, and we shall lay down these laws, written and unwritten, which shall embrace the greatest number of features that preserve constitutions.

60 Ibid. 336.

61 Polybius, *The Rise of the Roman Empire*, selected with Introduction by F.W. Walbank (Harmondsworth: Penguin Books, 1979), 310. On the almost 'cyclical' transformation and decay of the various forms of political society, see *ibid.* 305–11. 'Such is the cycle of political revolution, the law of nature according to which constitutions change, are transformed, and finally revert to their original form.' *Ibid.* 309.

62 J.G.A. Pocock, *Politics, Language and Time: Essays in Political Thought and History* (Chicago: the University of Chicago Press, 1989), 85.

We shall know not to regard as a democratic (or oligarchic) measure any measure which will make the whole democratic (or oligarchic) as it is possible to be, but only that measure which will make it *last* as a democracy (or oligarchy) for as long as possible.⁶³

Although guided by teleological considerations—understood in the very ‘thinest’ ontological manner possible—the political art of constitutional authorship is a purely secular activity, historical outcomes governed by immanent, not transcendental, conditions; ‘But the chief cause of overthrow, both of [democracy] and of aristocracy, is a deviation from justice in the constitution itself.’⁶⁴ Polybius makes a nearly identical argument: ‘Now in all political situations we must understand that the principal factor which makes for success or failure is the form of the state’s constitution: it is from this source, as if from a fountainhead, that all designs and plans of action not only originate but reach their fulfilment.’⁶⁵

In a manner dear to the hearts of the Italian Humanists, Aristotle identifies factionalism, the master sign of the presence of an original constitutional flaw, as the primary cause of political instability, causing the *civitas* to irreversibly slide into slavery-inducing tyranny. The primary cause of factionalism, in turn, is a constitutionally inscribed ‘inequality,’ which may be of either a political, social, or economic nature: ‘Inequality is everywhere at the bottom of faction, for in general faction arises from men’s striving for what is equal.’⁶⁶ For Aristotle, the central consideration ‘is that those who are responsible for the acquisition of power, whether they be private individuals or officials or tribes, or whatever aggregate or part you will, it is they who provoke faction.’⁶⁷ This insight provides the vital linkage between political stability and *libertas*; as freedom requires the presence of an approximate equality,⁶⁸ then democracy serves as a better safeguard against factionalism than does oligarchy. While it is true that the interests of everyone, including the aristocracy, must be guaranteed by the anti-factional rule of law

Nevertheless democracy is safer and less liable to faction than oligarchy. In oligarchies, two factions arise, one between the oligarchs and the people, and one of the oligarchs among themselves. In democracies, on the other hand, the only faction that arises is against oligarchy; *internal* faction within a democracy virtually occurs. Also, a constitution of the middle people is nearer to democracy than is a constitution of the few, is of all such constitutions the safest.⁶⁹

63 Aristotle, *The Politics*, 373.

64 Ibid. 320.

65 Polybius, *The Rise of the Roman Empire*, 303.

66 Aristotle, *The Politics*, 298.

67 Ibid. 308.

68 Ibid. 359–72.

69 Ibid. 299.

The fundamental problem with democracy, however, is, as Polybius observes, precisely that is based directly upon 'the People' itself. Democratic stability will, over time, yield to a 'decadent prosperity' that gives way, in turn, to 'a period of general deterioration.'

The principal authors of this change will be the masses, who at some moments will believe that they have a grievance against the greed of other members of society, and at others are made conceited by the flattery of those who aspire to office [i.e. the ubiquitous 'demagogue'.] By this stage they will have been roused to fury and their deliberations will constantly be swayed by passion, so that they will no longer consent to obey or even to be the equals of their leaders, but they will demand everything or by far the greatest share for themselves. When this happens, the constitution will change its *name* to the one which sounds the most imposing of all, that of freedom and democracy, but its *nature* to that which is the worst of all, that is the rule of the mob.⁷⁰

For Polybius, the solution to the interminable crisis of democracy is the 'mixed constitution'; 'It is clear that we should regard as the *best* constitution one which includes elements of all three species'—kingship, aristocracy, and democracy.⁷¹ Using Sparta and the constitutional reforms of Lycurgus as his historical model, Polybius explicitly identifies the 'mixture' of the three constitutional forms with a rudimentary form of balance of power theory, herein operating not on the inter-state level among foreign polities, but within the intra-state relationships among divergent groups within the *civitas*.

Lycurgus... did not make his constitution simple or uniform, but combined in it all the virtues and distinctive features of the best governments, so that no one principle should become preponderant, and thus be perverted into its kindred vice, but that the power of each element should be counterbalanced by the others, so that no one of them inclines or sinks unduly to either side. In other words, the constitution should remain for a long while in a state of equilibrium thanks to the principle of reciprocity or counteraction. Thus kingship was prevented from being arrogant through fear of the people who were also given a sufficiently important share in the government,⁷² while the people in their turn were restrained from showing contempt for the kings through their fear of the Senate. The members of this body were chosen on grounds of merit, and could be relied upon at all times to take the side of justice unanimously. By this means that part

70 Polybius, *The Rise of the Roman Empire*, 350.

71 Ibid. 303.

72 The fact that Polybius clearly indicates that it is possible, given the proper constitutional arrangements, for an hereditary monarchy to adequately safeguard *libertas* has led Skinner to not unpersuasively argue that the 'classical republicanism' of Civic Humanism should be more properly de-noted as the 'neo-Roman' tradition. Although generally sceptical of monarchy, both Aristotle and Polybius sharply differentiate between *monarchia*, which tends towards tyranny, and the ore benevolent form of 'kingship', which is consistent with the rule of law. Aristotle, *The Politics*, 342.

of the state which was at a disadvantage because of its attachment to traditional custom gained power and weight through the support and influence of the senators. For that very reason the result of the drawing-up of the constitution according to these principles was to preserve liberty for the Spartans over a longer period than for any other people of whom we have records.⁷³

Consequently, the teleologically 'correct' original act of constitutional drafting consists in achieving in precise, almost geometrical, form both the proper admixture of governmental forms with a corresponding balance of power among both the elements of the *civitas* and the institutions and procedures that relegate the political life of the State. The remainder of the vital sixth book of *The Rise of the Roman Empire* is taken up with a careful and detailed comparable analysis of the Roman constitution with the governmental forms of rival States.⁷⁴

Significantly, Aristotle expressly identifies true 'kingship' with trusteeship: a king is as

a manager of a household; not a person who is out for his own gain but as a trustee of the affairs of others, aiming not at a life of excess, but at one with moderation; and as someone who moreover makes friends with the notables but is also the people's leader.

Ibid. 351. For the importance of the similitude of kingship with trusteeship see below, this chapter. Skinner, *Liberty Before Liberalism*, 11.

73 Polybius, *The Rise of the Roman Empire*, 310–11.

74 Ibid. 311–52. Polybius' account has given rise to considerable academic discussion as to whether his description of the Roman constitution was an accurate one and, if it was, to what degree it could be described as constituting a deliberate 'mixture' of forms. As far as we can tell, the aristocratic Senate was the central organ of the Roman political system but crucially its role was advisory and declaratory, not strictly legislative. The various *comitia*, or popular assemblies performed the bulk of the legislative enactments, as well as the judicial work. However, the convening and voting procedures of these assemblies were under the direct control of the magistrates, most of whom (the consuls; the praetor) were members of the aristocracy; furthermore, senatorial oversight of plebian statutory enactments was guaranteed through the Senate's mandated right of 'approval'. George Mousourakis, *The Historical and Institutional Context of Roman Law* (Aldershot: Ashgate, 2003), 70 and 102–14. As Walbank himself reminds us, the Roman system 'with its law courts and popular assemblies preceded by *conditiones*, gave great scope for the demagogue'; in this view, the Augustan Principate could be plausibly interpreted as a populist-driven dictatorship. F.W. Walbank, 'Polybius' Perception of the One and the Many', in I. Malkin and Z.W. Rubinsohn (eds), *Leaders and Masses in the Roman World* (Leiden: E.J. Brill, 1995), 201–22 at 222. The error in classifying the Senate as a legislative body is at the core of our contemporary misunderstanding of the Roman constitution; 'the unconscious fiction of the collective parliamentary rule of the Senate has obscured the centrality of this much more important relationship, that is, of the one to the many, of the individual orator and/or office-holder and the crowd.' The operational presence of aristocratic-sponsored demagoguery effectively undermined the institutional and procedural divisions underlying the domestic

It is this tradition of 'Aristotelian Republicanism' that Pocock postulates as forming a discursive arc linking Renaissance Italy with Stuart England. However, as Pocock himself emphasises, classical republican theory, either with or without its 'Machiavellian Moment', did not take root within England, a future hegemon, in a wholly unsullied manner. During the fratricidal political conflict between Parliament and the Stuart monarchy, Republicanism became intertwined with Protestantism, especially with the Calvinism of 'the Low Church', and a more explicitly theological form of juro-political imaginary.⁷⁵ I would argue that the constitutionally more successful variants of Republicanism, specifically those of the successive hegemons Holland and England, proved to be so for two reasons. Firstly, there was a self-conscious rhetorical shift towards an ontologically 'thicker' mode of political discourse, one less reliant upon *habitus* and more directly grounded upon *ius naturale*. Zuckert has established this point clearly in the case of English republican theory;⁷⁶ Scott has seconded him, highlighting the importance of the multiple convergences 'between the language of classical republicanism and that of natural law'.⁷⁷ Secondly, there was a corresponding shift, even if only on the sub-textual level, towards a limited form of Corporatism; in England this was most conspicuously evidenced by an Althusian-style emphasis upon conventual political forms.⁷⁸ For Pocock, a leading example of this tendency was James Harrington, who, like Althusius, 'insisted that the Mosaic commonwealth had been a true classical republic, and that the authority electing the officers of religion had been that of the people in their orders, as when they elected the officers of the state'.⁷⁹ Skinner has also noted this tendency in English Republicanism; in the 17th century, the 'true subject or bearer of sovereignty, it was claimed, is neither the natural person of the monarchy nor any corporate body of natural persons, but is rather the artificial person of the state'.⁸⁰ The vital thread underlying these developments were identified by Maitland in his pioneering work in English legal history. Although English jurists repeatedly failed to establish the

balance of political power. Fergus Millar, 'Politics, Persuasion and the People before the Social War (150–90 B.C.)', *Journal of Roman Studies*, 76 (1986), 1–11 at 4.

75 Pocock, *The Machiavellian Moment*, Chapter VI, 361–400, *passim*. See also Martin Dzelainis, 'Anti-monarchism in English Republicanism', in Martin van Gelderen and Quentin Skinner (eds), *Republicanism and Constitutionalism in Early Modern Europe* (vol. i of *Republicanism: a Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 27–41, *passim*.

76 Zuckert, *Natural Rights and Republicanism*, 64–76.

77 Jonathan Scott, 'Classical Republicanism in Seventeenth-century England and the Netherlands', in Martin van Gelderen and Quentin Skinner (eds), *Republicanism and Constitutionalism in Early Modern Europe* (vol. i of *Republicanism: a Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 61–81 at 61.

78 See above, Chapter Three. Also see Pocock, *The Machiavellian Moment*, 396–400 for a discussion of the corporatist implications of the Puritan 'community of saints'.

79 Pocock, *The Machiavellian Moment*, 398.

80 Skinner, *Liberty Before Liberalism*, 3.

point explicitly, the historical evidence points to a tacit conflation of the 'private' person of the King with the 'fictitious' legal person of the Corporation, now denoted for the first time as 'the Crown' and held to be constitutionally identical with the quasi-republican 'Commonwealth'.⁸¹ The key phrase *Commonwealth* was a master sign of republican discourse; the effective albeit sub rosa reconciliation between republican and royalist principles was effected through the implicit re-configuration of the Crown-as-Corporation as a form of *Trust* that signified the entirety of a pluralistic realm. 'Crown', 'Commonwealth', and 'Trust' are all corporate bodies;⁸² this 'capacity to secure an identity for a group apart from its members is something that the trust shares with the corporation.'⁸³ Secondly, the move towards Corporatism necessitates a correlative movement towards Natural Law; both of these movements, Corporatism and Natural Law, converge in a Naturalist form of constitutional governance that supersedes the secular Positivism of Civic Humanism. Runciman has brought home this point beautifully well, in a manner that is of direct relevance to Grotius' treatment of the corporate VOC as 'natural (law) person.'

81 F.W. Maitland, 'The Corporation Sole', in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, 3 vols, iii (Cambridge: Cambridge University Press, 1911), 210–43, *passim*; see also F.W. Maitland, 'The Crown as Corporation', in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, 3 vols, iii (Cambridge: Cambridge University Press, 1911), 244–70, *passim*. The reason why English jurists insisted on performing what amounted to a sub rosa manoeuvre was that, in Maitland's famous words, 'English law has liked its persons to be real.' Maitland, 'The Corporation Sole', 242. We may tentatively identify here one of the many sources of the pronounced resistance to self-conscious metaphysical or ontological speculation exhibited by English jurisprudence more narrowly and British intellectual culture more widely. See David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), 68–9.

What is distinctive, and distinctively English, about the concept of the trust is that it is an essentially *ad hoc* formulation, developed without reference to... either Roman or German [legal theory]... What we are left with, therefore, is a distinctively English, and distinctly un-Hegelian, form of synthesis: ideas are assumed to be true because, when pieced together, they work; they are not assumed to work because, when pieced together, they are true.

Ibid.

82 F.W. Maitland, 'Moral Personality and Legal Personality', in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, 3 vols, iii (Cambridge: Cambridge University Press, 1911), 304–20, *passim*; Runciman, *Pluralism and the Personality of the State*, 99–101, 103–7, 116–17 and 119–21. Garnett sees the ultimate historical basis for this convergence between corporate and monarchical forms in the King's successful establishment following the Norman Conquest of rights in perpetuity for ecclesiastical bodies. George Garnett, 'The Origins of the Crown', *Proceedings of the British Academy*, 89 (1996), 171–214 at 172–3 and 209–10.

83 Runciman, *Pluralism and the Personality of the State*, 67.

Where group persons are fictitious entities, be those fictions founded on command or rule, the law is to be understood as an extension of the lives lived by natural persons, a distinct realm in which their actions are formalised in such a way as to suit either their own purposes or the purposes of their sovereign. But where group persons are deemed to be real, the law is nothing more, and nothing less, than an account of the life that surrounds it. The concept of the real group personality closes the gap between the world described in law and in the world in which men live. Of course, all laws must have some connection with the world around them if they are to be other than artificial in a pejorative sense. Moreover, it will sometimes make sense to seek to establish that relation in the language of 'reality'.⁸⁴

Runciman is correct to underscore the convergences between Maitland and Gierke on the point of the Naturalist foundation of the Corporation.⁸⁵ For Gierke, 'real group personality' originates within 'genuinely medieval thought'. Although he leaves this key term relatively un-defined, what Gierke appears to have in mind is a late Thomistic variant of neo-Realism. Employing language with which we are already familiar,⁸⁶ Gierke claims that juro-political thought 'when it is genuinely medieval starts from the Whole, but ascribes an intrinsic value to every Partial Whole, down to and including the Individual'.⁸⁷ This discursively culminates within a 'plurality-in-unity', which is identical with 'God', a 'divinely instituted Harmony which pervades the Universal Whole and every part thereof... that *Civitas Dei*, that God-State which comprehends the heavens and the earth', every individual and group forming a 'component part of that ordering of the world which exists because God exists'.⁸⁸ As Gierke makes clear, the discursive self-grounding of the Corporation is a form of *ius naturale* that is logically derived from a necessarily 'thick' ontology.

If each part reflects the whole, then not only must each part be a whole in its own right, but the whole must share a purpose or end with the purpose or ends of each of its parts. For just as a corporation cannot be a lesser commonwealth unless the commonwealth is capable of acting as a corporation, so no individual group can be a partial whole unless the whole is capable of acting in the manner of the parts it contains. The whole, therefore, must be a purposive organization, containing individuals or groups with purposes of their own.⁸⁹

84 Ibid. 116–17; see also *ibid.* 119–21.

85 Ibid. 64–71 and 89–123. Maitland was interested in formulating an English variant of Federalism and political pluralism; hence his pioneering interest, as an English academic, with both Gierke and Althusius.

86 See above, Chapter Four.

87 Otto von Gierke, *Political Theories of the Middle Ages*, trans. with Introduction by Frederic William Maitland (Cambridge: Cambridge University Press, 1900), 7.

88 Ibid. 8.

89 Runciman, *Pluralism and the Personality of the State*, 47.

Accordingly, every group entity can legitimately incorporate itself, independent of the Roman Law concession theory based upon the positive notion of 'higher legal authority', provided that the group is a 'real' one; that is, it complies with all of the foundational precepts of *ius naturale*, specifically the 'just cause'.⁹⁰ A *Genossenschaft* was a person because it was a legal entity—it was the subject of rights. It was real, however, because it was not an entity created by law—it was not the product of some contingent legal arrangement, whether constitutional or concessionary.⁹¹ In a thoroughly *descending* manner, each Fellowship consists of sub-groups, both legal and natural, each of which is 'real' by virtue of being the bearer of its respective sets of rights guaranteed by Natural Law.

There is thus what might be called an internal as well as an external aspect to the legal status of the *Genossenschaft*. Its internal aspect takes the form of a set of legal relations between individual subjects of rights; and these relations must reflect the external aspect of the group as a whole, which is itself a subject of rights. It is this reciprocity between the personality of the group and the personality of its members which renders the *Genossenschaft* a true conception of plurality-in-unity. It requires that every right exercised, or action owned by a group (a whole) must be reflected in the rights exercised and actions owned by each of its members (its parts). The unity of the whole is manifested in the legal relations of its parts, and this generates... a juristically coherent organicism.⁹²

A very complex set, or 'chain', of signifiers now stands revealed. 'Corporation' (=Trust=Commonwealth) signifies *ius naturale* that signifies *Respublica*. The 'Republic', in turn, is signified by a federalist Corporation (*Genossenschaft*) that is the sign of Natural Law; the 'State', the 'group', and the 'individual' are all the bearers of their respective sets of inalienable (i.e. non-concessionary) rights. There is, within this chain, a strict iterability between every 'group' and 'person' as each constitutes a form of corporate identity. As I shall show, this juro-political constellation encapsulates perfectly Grotius' own understanding of the legal personality not only of the VOC but the United Provinces themselves, both within intra-state and inter-state terms. Once again, Gierke's work provides the way forwards. Although his account of Corporatism is rendered somewhat anachronistic by a schematic reliance upon a uniquely and original Teutonic form of *Genossenschaft* and, thus, must be treated with caution, Gierke nonetheless formulates a general overview of the juro-political discourse of the 'long' 16th century that is very similar proposed in this volume. Gierke draws a clear distinction between the 'classical' or the 'Roman' jurists who employ a 'thin' ontological mode of argumentation as against a 'thicker' ontological variant that I generically identify as

90 Ibid. 49.

91 Ibid. 52.

92 Ibid.

'Late Scholasticism' but that Gierke de-notes as 'ecclesiastical' Natural Law.⁹³ It is the ecclesiastical writers 'on Natural Law, who generally belong to the Jesuit or Dominican Order, [who] are already [in the sixteenth century] constructing a system of political theory which is based entirely on the law of Reason. Such a system may be found, in its most developed form, in the writings of Suarez.'⁹⁴ Conversely, 'We must admit... that the thinkers who still persisted in making the *Politics* of Aristotle their basis, or followed other classical models, were far from adopting all elements of the new mode of speculation'; that is, neo-Thomism.⁹⁵ Gierke's notion of 'pure Natural Law' is what I de-note as 'Late Scholasticism'; both constructs perform in the 'long' 16th century the discursive and rhetorical functions that Koskenniemi assigns to descending 'thick' ontology in the 20th century.

It is astonishing to find this theory of pure Natural Law made to cover all the fundamental relations involved, and to decide all the fundamental questions raised, in the whole of the life of the State. Yet its adherents were unanimous that the transition from a state of nature, exclusively controlled by Natural Law, to the conditions of political life, had always been made in obedience to immutable natural rules, and that the vision of virtue of the same eternal principles. The first product of positive law [*ius civile*], and the first occasion for the play of human will, which they consented to admit, was merely the choice of a particular form of State.⁹⁶ Positive law [*ius civile*] being denied any capacity to affect or disturb the foundations of Natural Law, the solution of every fundamental problem in regard to the relation of the community to the individual, or that of the Ruler to the People, was accordingly left to the scope of a Law of Nature which sat high enthroned above the whole of historically established law.⁹⁷

If we restrict our attention to the narrower parameters of the 'event' of the Gro-tian Moment, it becomes immediately apparent why an intractable 'problem' with Civic Humanism developed simultaneously with Holland's ascendancy to hegemony following the successful completion of the Dutch Revolt, ideologically legitimated by this self-same Republicanism.⁹⁸ Once again it is Gierke who points out most clearly why this should be so: 'When we come to associations which transcend the State, we find that the natural-law theory of Sovereignty incompatible with any idea of a *super-State* [i.e. any idea of an international or federal political system], but compatible with the idea of a *social bond of connec-*

93 Otto von Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, trans. with Introduction by Ernest Baker (Boston: Beacon Press, 1957), 36–51.

94 Ibid. 36. See above, Chapter Three and below, Chapter Six.

95 Ibid.

96 Here Gierke is drawing upon the Voluntarist tradition within neo-Thomism that veers towards the Nominalist variant of ontology and underlines much of the generic theo-political discourse of 'Conciliarism'. See above, Chapter Three.

97 Ibid. 39.

98 Van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590*, 260–87.

tion between States’—the idea of a free partnership.⁹⁹ Employing the language of World-Systems Analysis, Wallerstein has formulated this ‘problem’ in the following manner: ‘The Netherland’s Revolution liberated a force that could sustain the world-economy as a system over some difficult years of adjustment, until the English (and the French) were ready to take the steps necessary for its definitive consolidation.’¹⁰⁰ The critical issue is Wallerstein’s accurate but vague identification of ‘some difficult years of adjustment.’ From the perspective of global governance, the inherent and defining heterogeneity of the Modern World-System proved intrinsically incompatible with the legal positivism and political monism engendered by the ‘thin’ ontology of Civic Humanism: ultimately *Civitas*—variously defined as ‘supreme State,’ ‘world-state above the competent member states,’ ‘super-State of law,’ ‘world-state,’ and ‘world state embracing all states’¹⁰¹—‘was at once universal, in the sense that it existed to realize for its citizens all the values which men were capable of realizing in this life, and particular, in the sense that it was finite and located in space and time.’¹⁰² The only way that the Humanist *civitas*, grounded upon positive Civil Law (*ius civile*)¹⁰³ could compellingly legislate for all men would be for it to render its borders co-determinate with the juro-political space to be so governed. The republican insistence upon the unitary nature of *civitas*¹⁰⁴ and the tension between national self-aggrandisement and the international common good,¹⁰⁵ would inevitably lead towards territorialism, legitimated by Humanist discourse as either peremptory acts of self-defence¹⁰⁶ and/or the enslavement of other peoples as ‘natural inferiors.’¹⁰⁷ By contrast, the Late Scho-

99 Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, 85.

100 Immanuel Wallerstein, *The Modern World-System II: Mercantilism and the Consolidation of the European World-Economy, 1600–1750* (New York: Academic Press, 1980), 210.

101 Richard Tuck, *The Rights of War and Peace: Political Thought and International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999), 18–31.

102 Pocock, *The Machiavellian Moment*, 3.

103 Gelderen, ‘Aristotelians, Monarchomachs and Republicans,’ 208–11.

104 Onuf, *The Republican Legacy in International Thought*, 60–1.

105 Nederman has convincingly demonstrated that even the relatively ‘thick’ ontology of Ciceronian Late Stoicism could be pressed into the service of imperial conquest in the hands of Civic Humanism. See Cary J. Nederman, ‘Humanism and Empire: Aeneas Sylvius Piccolomini, Cicero and the Imperial Ideal,’ *Historical Journal*, 36/3 (1993), 499–515, *passim*.

106 Tuck, *The Rights of War and Peace*, 18–31. ‘For Machiavelli, external threat was the problem [for the republic’s survival]. The Roman answer to a threatening environment was expansion.’ Onuf, *The Republican Legacy in International Thought*, 43.

107 Tuck, *The Rights of War and Peace*, 34–47. See below, Chapter Eight. An ancillary issue here was the fear among republicans that the expansion of *imperium* would result in political corruption and decadence, repeating the Polybian cycle and undermining *libertas*. David Armitage, ‘Empire and Liberty: A Republican Dilemma,’ in Martin van Gelderen and Quentin Skinner (eds), *The Values of Republicanism in Early*

lastics—or, alternatively, the ‘ecclesiastical writers’—practised a sub rosa form of mimetic repetition within the contours of the trace of neo-Realist ontology, discursively re-formulating ‘the unsubstantial ghost of the old *imperium mundi*... [by making] the indestructible germ of that dying system of thought yield the new and fruitful idea of *international society*.’¹⁰⁸ In Gierke’s terms

On the one hand a tendency continually re-appeared to harden international society into a world-State, and to arm it with the authority of a Super-State organised on Republican lines: on the other hand, the stricter advocates of the theory of sovereignty rejected *in toto* any idea of a natural community uniting all States together. But the doctrine which held the field, and determined the future of international law, was a doctrine which steadily clung to the view that there was a natural-law connection between all nations, and that this connection, while it did not issue in any authority exercised by the Whole over its parts, at any rate involved a system of mutual social rights and duties. From this point of view international law was conceived as a law binding *inter se* upon States which were still in a state of nature in virtue of their sovereignty, and binding upon them in exactly the same way as the pre-political Law of Nature had been binding upon individuals when they were living in a state of nature.¹⁰⁹

Not for the first time, we witness a rhetorically precise and logically necessary convergence between World-Systems Analysis and the ontologically grounded discourse(s) of International Law; the neo-Realist ontology of Late Scholasticism posits the heterogenous community of the Modern World-System, one temporally grounded upon the associational international society presupposed by the early Capitalist World-Economy. Exactly as we should expect, ‘there was gradually developed a theory of pure Natural Law, in which the conception of *jus gentium* only appeared, in the entirely changed sense of international law, as the particular form of Natural Law which was valid among sovereign States.’¹¹⁰

Grotius’ own political position as author(ity) is central to the successful ‘negotiation’ between competing discursive impulses. Not only was he Advocate-General of the United Provinces, he ‘doubled’ also a senior legal counsel to the VOC, the institutional expression of Dutch capitalist and statist hegemony. The ‘legal’ text of *De Indis* is necessarily invested with an incalculable degree of historical complicity in the genesis of the Modern World-System.¹¹¹ The inherent

Modern Europe (vol. ii of *Republicanism: A Shared European Heritage* (Cambridge: Cambridge University Press, 2002), 29–46 at 29–35.

108 Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, 85.

109 Ibid.

110 Ibid. 39. For Grotius’ treatment of *ius gentium*, both ‘primary’ and ‘secondary’, see below, Chapter Six.

111 ‘If Grotius had not written [*Mare Liberum*] capitalist processes would have ‘invented’ someone else to write a similar tract.’ Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 26. See Hans- Jürgen Wager, ‘Free Seas, Free Trade, Free People: Early Dutch Institutionalism’, *History of*

tensions and inconsistencies of Holland's position as a hegemon within the Modern World-System themselves serve as both the latent and manifest textual indeterminacies and fissures of *De Indis*, a text riddled with the metaphysics of Presence and iterability, as demonstrated in Chapter Two. Grotius' discursive task was to reformulate the intrastate logic of the United Provinces in terms of the interstate operation of the Capitalist World-Economy, necessitating a relative discursive shift towards the trans-nationalism of neo-Thomism. Gierke establishes a clear correspondence between the intra-state and inter-state levels of Naturalist discourse. The vital hinge-point is that neo-Thomism both justified and necessitated a pluralistic constitutional order, the heterogeneity of the political mimetically duplicating the ontological plurality of 'the Real,' or 'Presence'; 'The natural-law theory held rigorously to the principle that it was only the Whole *or* the part [of a federation] which could ever be a State, and that both could not be simultaneously States.'¹¹² Most critical here is that the 'thick' ontological dimension of Republicanism readily corresponds to both a federalist and corporatist model of constitutional order.

A federation must therefore be a case either of a single unitary State with a corporate structure, or a system of contract between sovereign States resting on the same basis as international law. But when the natural-law theorists proceeded to apply this idea—treating Germany as a unitary State, and then placing the United Netherlands, the Swiss Confederation and the Hanseatic League, along with the loosest of confederations, under the same indiscriminate rubric of *foedus* or contract—they found themselves enabled, by the very elasticity and ambiguity of their conception of partnership, to glide insensibly into the use of terms and ideas drawn from the law of corporations.¹¹³

Strategically investing the (neo-) Aristotelian precepts of Civic Humanism with the relatively 'thick' (i.e. modified neo-Realism) ontology of Late Scholastic Natural Law would legitimate the global enforcement of the Capitalist intrastate requirements of the United Provinces in the mandated absence of a universal *Civitas*. The signature Grotian inversion of 'Person' with 'State,' governed by the logic of the iterable Dutch and World economies, yielded, consistent with the Corporate Sovereignty of the VOC, a 'privatisation of international authority,' globally legitimated by Naturalism—a Naturalism that, however, pivotally oscillated between 'thick' and 'thin' variants, as the tactical exigencies of the situation demanded. Nonetheless, the republican/capitalist notion of 'Private War,'

Political Economy, 26/4 (1994), 395–422, *passim*. Intriguingly, not just Grotius but all of his Dutch compatriots discussed by Wagener were committed to the notion of free rather than protectionist trade; 'If there is one central proposition to be extracted from [seventeenth-century Dutch] texts, it ought to be the free-trade proposition: free trade increases the wealth of nations and socializes the people.' Ibid. 419.

112 Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, 86.

113 Ibid.

predicated upon Natural Law, maintains Grotius' continuity with the normative holism of Primitive Legal Scholarship.

III Grotius, *Respublica* and the Capitalist World-Economy

The question that must now be addressed is whether, and to what degree, the seventeenth-century Dutch economy can be properly de-noted as 'Capitalist'. Here, the issue turns on whether or not mercantile, or 'commercial' Capitalism, expressed in the form of Circulationism, constitutes a 'modern' form of production. Teschke, in his impressive *The Myth of 1648*, is wholly disparaging of this notion. For him, Mercantilism is to be understood as 'politically constituted unequal exchange prolonging medieval practices into the early Modern World. This interpretation rests on the fundamental distinction between commercial capitalism, with profits generated exclusively in the sphere of circulation, and modern capitalism, involving a qualitative transformation of relations of production.'¹¹⁴ Central to Teschke's account of commercial Capitalism¹¹⁵ is a rather orthodox distinction between 'Politics' and 'Economics,' one that I have already critiqued on several occasions;¹¹⁶ the capitalistic 'free market' is always spatio-temporally embedded within some concrete set of institutional arrangements. As 'commercial' Capitalism merely mediates the exchange 'of surplus already extracted by political means, it does not fundamentally change the social relations of production. Trade does not in itself generate surplus-value, or even value; it merely realises profits. Trade in no way generates aggregate economic growth; it merely redistributes existing surpluses. Merchant wealth is therefore not capital.'¹¹⁷

One of the marked characteristics of Teschke's robust account—one that implicitly rests upon orthodox neo-Marxism's metaphysical assumption concerning an essentialising difference between 'use' and 'exchange' value—is that he expressly equates commercial Capitalism as an economic system with the specifically political form of the territorialist and Absolutist monarchical State. As a result, he almost completely obviates any detailed consideration of the economic nature of and role within the World-Economy of that set of polities generically de-noted as the 'commercial republics'.¹¹⁸

Mercantilist trade thus remained subordinate to and dependent on the political power of the Crown. It did not usher in a modern world-system, based on a new mode of territorial organization and international relations, but essentially extended the pre-modern logic of absolutist territorial organization into the non-European world...Commercial

114 Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (London: Verso, 2003), 197.

115 Ibid. 197–214.

116 See above, Chapters Two and Four.

117 Ibid. 202.

118 See below, this chapter.

capitalism under dynastic conditions was a geographical strategy of extending the accumulating reach of pre-modern states, not a qualitative change in the logic of the world order.¹¹⁹

Teschke then employs this insight as a means of critiquing the basic viability of World-Systems Analysis; 'Precisely because world-systems theorists [sic] equate long-distance trade with capitalism, which thus becomes a phenomenon of virtually all international economic systems, they¹²⁰ are forced to push the existence of a modern world-system back into ever more distant pasts, leading to meaningless speculation about 5,000 years of the world-system.'¹²¹

Most interesting from our perspective is the near-total absence of any discussion of the United Provinces. Teschke mentions the Netherlands only twice, both times as part of an unfavourable comparison with England, the historical bearer of 'true' Capitalist Modernity.¹²² However, Teschke does appear to place great weight upon Marx's brief reference to 'the Hollanders' in Volume III of *Capital*, which he reproduces in full.

The law that the independent development of commodity capital stands in inverse proportion to the level of development of capitalist production appears particularly clearly in the history of the carrying trade, as conducted by the Venetians, Genoans, Dutch, etc., where the major profit was made not by supplying a specific national product, but rather by mediating the exchange of products between commercially—and generally undeveloped communities and by exploiting both the producing countries.¹²³

It does, therefore, come as something of a pleasant surprise to learn that Brenner himself, Teschke's leading authority, openly recognises 'the essentially modern character of the Dutch economy.'¹²⁴ In Brenner's opinion, the

119 Ibid. 204.

120 Presumably Teschke means 'all'. If so, then he is mistaken; what he describes is absolutely *not* the position of Wallerstein or Arrighi, as I have made clear in Chapter Two.

121 Ibid. For generic 'world-system theorists', Teschke lists the 'usual suspects' of Janet Abu-Lughod, Andre Gunder Frank, and Barry K. Gills. In Chapters Seven and Eight I will be revisiting Abu-Lughod's 'meaningless speculation'.

122 Ibid. 202.

123 Cited in *ibid.* 206–7.

124 Robert P. Brenner, 'The Low Countries in the Transition to Capitalism', in Peter Hoppenbrouwers and Jan Luiten van Zanden (eds), *Peasants into Farmers? The Transformation of Rural Economy and Society in the Low Countries (Middle Ages-19th Century) in Light of the Brenner Debate* (Turnhout: Borepols Publishers, 2001), 275–338 at 332.

Dutch economy as it emerged in the Early Modern Period... appears to have been quite fully capitalist. It was unburdened by systems of ruling class surplus extraction by extra-economic compulsion (either lordship/serfdom or the tax-office state). Moreover, its producers, notably its agricultural producers, were entirely dependent on the market and subject to competition in production to survive, so had no choice but to maximise their price-cost ratio by specialising, moving from line to line in response to market signals, accumulating their capital, and seeking to bring in the latest technique. High levels of investment obtained, which issued in rising capital/labour ratios, rapid productivity growth, and, ultimately, high wages and income per person more generally.¹²⁵

Contra Teschke, and more in spirit with World-Systems Analysis, I would follow Arrighi in dissenting from Marx's rather deterministic and reductive 'Productionist' bias; one which, on occasion, Marx himself appears to repudiate: Teschke admits that Marx held that 'commercial capitalism acted as a 'solvent' of pre-capitalist [social] relations of production by subjecting production more and more to the demands of capital.'¹²⁶ This accords well with Arrighi's World-System view.

As in Marx's *general* formula of capital (MCM), so in Braudel's definition of capitalism what makes an agency or social stratum capitalist is not its predisposition to invest in a particular commodity (e.g. labour power) or sphere of activity (e.g. industry). An agency is capitalist in virtue of the fact that money is endowed with the 'power of breeding' (Marx's expression) systematically and persistently, regardless of the nature of the particular commodities and activities that are incidentally the medium at any given time.¹²⁷

The 'power of breeding' of the Dutch economy is best exemplified by its thoroughly 'capital intensive' nature,¹²⁸ grounded upon a 'tax revolution'¹²⁹ fully commensurate with the political decentralisation of the Republic¹³⁰ and vitally sup-

125 Ibid. For a more general overview that perfectly accords with Brenner's, see Maarten Prak, *The Dutch Republic in the Seventeenth Century* (Cambridge: Cambridge University Press, 2005), 75–110.

126 Teschke, *The Myth of 1648*, 207.

127 Giovanni Arrighi, *The Long Twentieth Century* (London: Verso, 1994), 8.

128 Marjolein't Hart 'The Dutch Republic: the Urban Impact Upon Politics', in Karel Davids and Jan Lucassen (eds), *A Miracle Mirrored: The Dutch Republic in European Perspective* (Cambridge: Cambridge University Press, 1995), 57–98, *passim*.

129 W. Fritschy, 'A "Financial Revolution" Reconsidered: Public Finance in Holland during the Dutch Revolt, 1568–1648', *Economic History Review*, 56/1 (2003), 57–89, *passim*.

130 Ibid. 69–70:

In their fiscal policy... the States of Holland showed their readiness not only to overcome established differences between cities and countryside, but also to combat local 'particularism'... [Weak] 'centralisation' was a remarkable success at the provincial level. It counters the claim that the combination with a strong national centre is indispen-

plemented by the establishment of the Amsterdam stock-exchange.¹³¹ Even if we recall Marx's caveat that commercial Capitalism's capacity to act as a 'solvent' for social relations in eliminating pre-capitalist modes of production 'depends first and foremost on the solidity and inner articulations of this mode of production itself';¹³² then the United Provinces still stands up well as a wholly 'modern' economy, belying Marx's rather casual conflation of the Dutch with the Venetian and Genoese cycle of systemic accumulation. If we were to expressly adopt Brenner's intensely materialist notion of 'capitalist social-property relations' as the key to economic transition—eschewing the alternative of an urban-centric neo-institutional economic explanation, either neo-Smithsonian or neo-Malthusian—then the United Provinces still clearly emerges as a capitalist society. Grounding his account on the success of Dutch peasants in reclaiming and cultivating the peat lands—a process that precluded the formation of a nobility that could forcibly extract surplus-production—Brenner holds that the Dutch peasantry obviated subsistence production and entered directly into competitive market relationships.¹³³ As a result

Unlike anywhere else in Europe, the subjection of the agricultural producers to dependence on the market and the rise of a large market-dependent population involved in trade and industry in towns occurred to a very great extent as part of *a single process of agrarian transformation*. The emergence, on the one hand, of Dutch clothes-making, brewing, shipping, shipbuilding, and peat digging—much of which was oriented to export—and, on the other, of Dutch dairy and cattle raising were thus two sides of the

sable for successful state formation. A federation of provinces was obviously a viable alternative if combined with a sufficient measure of fiscal centralisation at the provincial level.

As a result, 'in early modern Holland a high concentration of capital and political dominance of the merchant class kept in check and fostered institutional efficiency far more than could be the case in Flanders and Brabant' Peter Hoppenbrouwers and Jan Luiten van Zanden, 'Restyling the Transition from Feudalism to Capitalism: Some Critical Reflections on the Brenner Thesis,' in id. (eds), *Peasants into Farmers? The Transformation of Rural Economy and Society in the Low Countries (Middle Ages-19th Century) in Light of the Brenner Debate* (Turnhout: Borepol Publishers, 2001), 19-40 at 36.

131 Fritschy, 'A "Financial Revolution" Reconsidered,' 80.

132 Cited in Teschke, *The Myth of 1648*, 207.

133 Brenner, 'The Low Countries in the Transition to Capitalism,' 311.

The agricultural producers of the peat lands were... forced into dependence upon the market for their inputs, thereby subjected to competitive production and obliged, as a result, to enter into lines in which they could hold their own in terms of price-cost maximisation... as the unintended consequence of the acts of reclamation by which, in keeping with the feudal rules for reproduction, they had sought to extend cultivation for the purpose of production for subsistence onto terrain at the ecological margins of the European feudal economy they ended up undercutting the ability of the soil to support production for subsistence and transforming themselves into market-dependent *capitalist farmers*.

same extraordinary process of ecologically-driven separation of the direct producers from their means of subsistence leading to the transition to capitalism, and they must be understood together.¹³⁴

Thus, when Holland emerged into the World-System it did so as an already fully constituted 'modern' economy. Contra Teschke, the event of the Grotian Moment signifies not the extension of the 'pre-modern logic of absolutist territorial organization [or *imperium*]' into the non-European world,' but the precise opposite: the de-notation of the Free Seas as *res extra commercium*.

A more fundamental problem, however, remains unsolved. It is central to the no-Marxist critique of World-Systems Analysis that it is illicit to denote the World-Economy of the 'long' 16th century as 'Capitalist'. The two indispensable criteria for modern economic growth are: (i) a long-term substantial increase in per capita income; and (ii) the self-sustaining nature of such growth, 'the self-propulsion being due to the fact that modern economies function within a larger economic system'.¹³⁵

All empirical evidence points to the fact that economic growth 'was not a normal condition in Europe between 1500 and 1800. On the contrary, stagnation seems to have been the norm' with annual per capita growth averaging at between 0.04 and 0.08 per cent.¹³⁶ It is important to note, however, the critical variable of regional variation. Although growth in certain areas, most notably the now semi-peripheral zone of the Mediterranean, was virtually at zero, there was noticeable growth centred upon the North Sea region—southern England, northern France, the Low Countries, and the lower Rhineland. Yet, even here per capita growth was severely limited by contemporary standards.¹³⁷ Thus, even if the Dutch Republic was a fully 'modern' economy the World-Economy within which it was embedded was not, leading to a fatal long-term contraction. Brenner is unyielding on precisely this point.

From the end of the Middle Ages, Dutch producers had, on the basis of their modern, capitalist social-property relations and institutions responded exceedingly well to the

134 Ibid. 309. There is, in fact, a clearly demonstrable relationship between levels of agricultural productivity and rates of urbanisation. Maarten Prak, 'Early Modern Capitalism: An Introduction', in id. (ed.), *Early Modern Capitalism: Economic and Social Change in Europe, 1400–1800* (New York: Routledge, 2001), 1–21 at 10.

135 Prak, *The Dutch Republic in the Seventeenth Century*, 110.

136 Jan Luiten van Zanden, 'Early Modern Economic Growth: A Survey of the European Economy, 1500–1800', in Maarten Prak, *The Dutch Republic in the Seventeenth Century* (Cambridge: Cambridge University Press, 2005), 69–87 at 84.

137 Ibid. 85:

In Holland, per capita GDP increased markedly only between 1580 and 1650, after which a process of stagnation set in for more than 150 years. Moreover, even this 'growth spurt' of the Dutch Golden Age was achieved in part at the expense of the economy of the Southern Netherlands, which suffered a severe decline during the same decades.

steadily growing opportunities that were presented to them. But these opportunities emanated, in the first instance, and during the entire course of Dutch economic expansion, fundamentally from beyond the Northern Netherlands itself, from the surrounding economy of Europe... [The Dutch economy] differentiated itself from the leading economies that preceded it (Flanders, Brabant, the city-states of northern Italy) in its capitalist modernity, manifested most tellingly in its advanced capital-intensive agricultural sector. But it shared those economies' imbrication in, and dependence upon, the pre-capitalist economy of Europe as a whole... [The Dutch economy] could not achieve self-sustaining growth¹³⁸ because its fate was inextricably bound up with a European economy—and especially a European agriculture—that was almost entirely pre-capitalist.¹³⁹

The core criticism of World-Systems Analysis from the neo-Marxist vantage is that the 'Capitalist World-Economy' of the 'long' 16th century is a *misnomer*.

Any work undertaken under the aegis of World-Systems Analysis, which this volume certainly purports to do, must respond to these trenchant criticisms directly. I believe that there are two responses that can be made. Firstly, consistent with the 'strategic alliance' between Deconstruction and Post-Colonialism outlined in Chapter Two, I would argue that it is crucial that we resist all essentialising tendencies when discussing the Modern World-System. Prak has argued, quite convincingly in my opinion, that the 'problem' concerning modern capitalist development 'remains a question of semantics.'¹⁴⁰ If we substitute the narrower term 'Capitalism' for the more generic concept of 'economic growth'¹⁴¹ and shift our focus away from an essentialist qualitative transformation towards an accumulative quantitative 'tipping point',¹⁴² then we will be able to discern a more basic continuity between mercantile and industrial Capitalism. 'The remarkable difference in achievement of the pre-modern and modern economies—virtual stagnation versus structured growth—does not necessarily imply that we are dealing with fundamentally different economic systems.'¹⁴³ Although clear growth differentials existed within the two eras, 'the underlying principles of growth remained unchanged.'¹⁴⁴ My reasoning here is directly evocative of the Braudelian conception of TimeSpace developed in Chapter Two, which is premised upon the

138 Although its duration was considerable. 'Even during the first half of the eighteenth century, the English economy still lagged behind the Dutch in terms of either overall productiveness or real wages.' Brenner, 'The Low Countries in the Transition to Capitalism', 333.

139 Ibid. 332.

140 Prak, *The Dutch Republic in the Seventeenth Century*, 110.

141 Prak, 'Early Modern Capitalism: An Introduction', 14–15.

142 Edwin Horlings, 'Pre-Industrial Economic Growth and the Transition to an Industrial Economy', in Maarten Prak, *The Dutch Republic in the Seventeenth Century* (Cambridge: Cambridge University Press, 2005), 88–104, *passim*.

143 Ibid. 90.

144 Ibid. 101.

need to pay particular attention to varying rates of transformation and assigning each 'wave' or 'rhythm' its own qualitative dimension. De Vries has made a similar argument to my own; 'A single, common model developed in this spirit—Braudelian in its structure but more rigorously economic in content—might supply a common vocabulary to study economic growth before and after the Industrial Revolution.'¹⁴⁵ England, the locale of the transition to 'Capitalist Modernity' and the instigator of the third cycle of systemic accumulation, provides an excellent example of the cross layering of Braudelian waves.

Ironically, English growth in the two centuries after 1800 has not been so unique. It is remarkable that the country which has provided the model for the classical 'Industrial Revolution'—the decisive break between a stagnating agrarian society and a dynamic industrial economy—was in fact characterised by an impressive dynamism in the centuries preceding this 'revolution'... it would appear that the 'Industrial Revolution' of the second half of the eighteenth century was no 'accident'... but the almost predictable continuation of the exceptionally dynamic development of the British economy in the sixteenth, seventeenth and the first half of the eighteenth centuries.¹⁴⁶

Adopting a more nuanced Braudelian approach yields two important results. One, it allows us to draw useful non-linear comparisons between the two successive hegemonies, Holland and England.

The 'eruptive' and site-specific quality of innovative economic growth, [that] undermines the linear growth model, is accompanied by forces that lead to deceleration and relative decline in pre-industrial and post-industrial revolution economies alike. Neither the Netherlands nor Britain found long-term growth after their initial transformations to be anything like a smooth or self-sustained process.¹⁴⁷

Rather than a revolutionary discontinuity, the industrialisation of England, paralleling the 'commercialisation' of Holland, 'can fruitfully be viewed as the culmination of a process with deep roots in the preceding two centuries.'¹⁴⁸ Second, we are able to discern at least two separate phases of industrialisation, lending credence to the notion of a 'second' Industrial Revolution, the first from c.1750–1815 and the second from c. 1870 onwards.

It is only after 1870 that the average growth rate [for the core-zone] shifts from a long-term average of under 1 per cent per annum to a growth twice as fast. The revised esti-

145 Jan de Vries, 'Economic Growth Before and After the Industrial Revolution: A Modest Proposal', in Maarten Prak, *The Dutch Republic in the Seventeenth Century* (Cambridge: Cambridge University Press, 2005), 177–94 at 191.

146 Van Zanden, 'Early Modern Economic Growth', 85.

147 De Vries, 'Economic Growth Before and After the Industrial Revolution', 186.

148 Ibid. 184.

mates of British growth show an acceleration long before 1870... but even here no trend consistent with post-1870 British experience can be extended back as far as 1830.¹⁴⁹

If we were to persist in our un-Braudelian essentialist folly, we would be logically forced to postulate that Capitalist Modernity, the 'true' originary of contemporary International Politics, did not commence until the final quarter of the 19th century; this is, to say the least, deeply counter-intuitive. The potential of all of this for ironic subversion is not lost on de Vries, who audaciously implies that the Industrial Revolution be regarded as an *histoire conjuncturelle*; 'At once, this revisionism re-inserts the important achievements of the British industrial revolution in their European context—a major industrial advance occurring within a growing commercial economy—and qualifies their nineteenth century impact—just one form of specialisation in a multi-stranded development process.'¹⁵⁰

Contra to Teschke and Brenner, I would re-formulate the 'problem' of mercantile/commercial Capitalism in terms of successive cycles of systemic accumulation as developed by Arrighi and presented in Chapters Three and Four: mercantile Capitalism—or, in the alternative, the early modern 'Capitalist World-Economy'—is 'Dutch Capitalism'¹⁵¹ extended throughout the World-System via Colonialism.

Nowhere, except in Europe, did these elements of capitalism coalesce into the powerful mix that propelled European states towards the territorial conquest of the world and the formation of an all-powerful and truly globalist capitalist world-economy. From this perspective, the really important transition that needs to be elucidated is not that from feudalism to capitalism but from scattered to concentrated capitalist power.¹⁵²

The focus of this study has been on the Modern World-System not as a form of global Capitalism but as the historical contour of a form of global governance. As International Law can only be said to be 'real' if there is a discernible community or polity for it to govern,¹⁵³ then it is clear that International Law first emerged in its 'primitive' form during the 'long' 16th century when a discernible and integrated World-System began to evolve. In a certain sense, the issue of whether or not this system was inherently capitalist or not is of incidental consideration; in Arrighi's words, this is *not* 'the really important transition.' What ultimately requires demonstration is not the capitalistic nature of the World-System but its *Modernity*. This can be done in two ways. The first way is to follow Arrighi and re-present the pivotal notion of Corporate Sovereignty as the juro-political expression of the defining characteristics of the Dutch cycle of systemic accumu-

149 Ibid. 183.

150 Ibid.

151 Arrighi, *The Long Twentieth Century*, 140–4.

152 Ibid. 11.

153 See above, Chapter One.

lation; namely, the re-organisation of the international trading networks of the World-Economy along the lines of incorporated personality. Even if the entirety of the World-Economy during the 'long' 16th century was still mired in stagnating pre-capitalistic agriculture, the organisation and early institutionalisation of global commerce now followed a corporate model sponsored by the outstanding zone of 'Pre-Modern' economic growth—Holland—the sign of the trans-national mercantile company signifying the ascent of a Euro-centric Modernity.

The second way—and here I return to the Post-Colonial critique of World-Systems Analysis that I discussed in Chapter Two—is to argue that the master-sign of Modernity is not Capitalism but Colonialism; to be precise, *Coloniality*, which Mignolo identifies as the site of the colonial difference. Substituting 'Coloniality' for 'Capitalism' is what enables us to move beyond the essentialising Euro-centrism of neo-Marxist discourse. Indeed, Marx himself, who equivocates repeatedly on the historical significance of Coloniality, would appear to concur with this point: that a critical threshold in World History has been reached at the precise moment when 'Europe' and 'non-Europe' become mutually conditional. In Volume III of *Capital* Marx frankly acknowledges that the 'Great Discoveries' of Asia and the Americas, coupled with the development of mercantile Capitalism, constituted

[K]ey moments... in the transition from a feudal system of production to a capitalist. The sudden expansion of the world market, the multiplication of goods in circulation, the competition among European nations to acquire the Asian products and American treasures for themselves, the colonial system, all made crucial contributions to cracking the feudal limitations on production.¹⁵⁴

If we continue to eschew 'Capitalism' in favour of 'economic growth'—or, in an even more Marxist turn, 'materialism'—then the vital linkage between Coloniality and (economic) Modernity emerges clearly: investment.¹⁵⁵ The massive, and highly discontinuous, influx of bullion, or specie, into the hitherto closed European world system occasioned a fundamental alteration within regional investment patterns that acted as the necessary precondition for agricultural and early industrial development.¹⁵⁶ As we should expect, the focus of these developments were the Low Countries and England; 'With rising incomes and savings levels

154 Marx, cited in Prak, 'Early Modern Capitalism', 4.

155 As Hoppenbrouwers points out, investments 'are one of the blind spots in the entire Brenner thesis.' Peter Hoppenbrouwers, 'Mapping an Unexplored Field: The Brenner Debate and the Case of Holland', in Peter Hoppenbrouwers and Jan Luiten van Zanden (eds), *Peasants into Farmers? The Transformation of Rural Economy and Society in the Low Countries (Middle Ages-19th Century) in Light of the Brenner Debate* (Turnhout: Borepols Publishers, 2001), 41-66 at 54 fn. 19.

156 Ian Blanchard, 'International Capital Markets and Their Users, 1450-1750', in Maarten Prak, *The Dutch Republic in the Seventeenth Century* (Cambridge: Cambridge University Press, 2005), 107-24, *passim*.

money for investment was becoming in the early modern period progressively cheaper and more available, making England and the lower Rhineland an oasis of cheap money in a European market where traditional 'real' rates continued to prevail.¹⁵⁷ As a direct result of the colonial difference, cosmopolitan finance capitalism was introduced into the core-zone, institutionally shaped by the joint-stock companies.

The great mercantile companies attracted a flood of would-be subscribers to take up their shares and, in attempting to serve capital gains by limiting equity issues whilst expanding their business on the basis of broad finance to provide long-term finance, initiated a frenetic series of 'raids' aimed at opening up these companies to outsiders. Other investors showed a willingness to roll-over short-term bill finance to provide long-term investments in the plantation economies of the New World and thus found another outlet for their funds. But investment opportunities were limited, and as the marginal efficiency of capital fell there began a frenzied struggle to find new investments in a situation which was aggravated by Dutch investors seeking outlets in England—much to the ire of Englishmen seeking ways to place their money. The basic problem was that at the end of the seventeenth century the English and Dutch capital markets were awash with money and investors were accordingly prepared to put out their money on the most speculative of ventures.¹⁵⁸

The result was a net convergence of Dutch and English capital interests, culminating in co-ordinated bi-lateral investment stratagems. This, in turn, laid the material(ist) foundations for the hegemonic succession between the United Provinces and the United Kingdom that took place in the final quarter of the 18th century.

During the period 1670–1770 Anglo-Dutch merchants working in co-operation with each other, now showed themselves quite willing to roll-over short-term bill finance to provide long-term investment in foreign agriculture and industry... The second third of the eighteenth century thus saw England and the Netherlands become major critical exporters, allocating shortages abroad and providing necessary funding for the expansion of foreign industrial and commercial enterprises.¹⁵⁹

This fundamental alteration of economic growth within the core-zone of the 'Capitalist' World-Economy, re-aligned along the Anglo-Dutch axis, cannot be understood apart from an equivalent appreciation of the political status and role of the 'commercial republics' within the Modern/Colonial World-System, of which the United Provinces and the United Kingdom—the latter the perennial 'quasi-republic'—were the outstanding examples. The commercial republics,

¹⁵⁷ Ibid. 117.

¹⁵⁸ Ibid. 119.

¹⁵⁹ Ibid. 120.

a unique and singular set of actors within the World-System and the World-Economy, were all urban-centric, and, as a result, highly integrated into international commerce and finance. Their economic growth, premised upon commercial Capitalism, was centred in the cities and politically and institutionally inter-linked to the pre-eminent world-cities of the core-zone, Amsterdam and London.¹⁶⁰ As a result, the commercial republic exhibited two signature characteristics as a qualitatively distinct form of international actor within the World-System. It was antithetical to the territorialism and dynastic patrimonialism of the Absolutist monarchies, which Teschke misleadingly suggests as constituting the totality of early modern International Politics;¹⁶¹ the core component of Remonstrant opposition to the stadholder was precisely the patrimonialist assumptions of the House of Orange.¹⁶² It was precisely the anti-patrimonial convergence of the two capitalistic hegemons Holland and England that led to the ultimately successful strategy of 'balancing' against the Absolutist France of Louis XIV during the pivotal War of the Spanish Succession (1702–13) that successfully relegated patrimonial France to the status of the 'failed' hegemon of the 18th century.¹⁶³ 'Indeed [English] whiggish and [Dutch] Orangist rhetoric were never more in harmony than at this juncture.'¹⁶⁴ Together they generated an ideology which has been credited with changing the mental map from 'Christendom' to 'Europe'.¹⁶⁵ Accordingly, both Dutch and English political pamphleteers 'were called upon

160 'In each of these examples, economic growth was closely related to the fact that the specific city and region either managed to acquire a central position in the international trading network, or was able by virtue of significant innovations to build up its own export industries.' Zanden, 'Early Modern Economic Growth', 85.

161 Although he identifies the United Provinces as 'an independent oligarchic merchant republic' and states (incorrectly) that 'England became a parliamentary constitutional monarchy presiding over the world's first capitalist economy,' Teschke holds that 'the early modern international system was dominated by the numerically and power-politically preponderant dynastic states.' Teschke, *The Myth of 1648*, 218.

162 Herbert H. Rowen, 'The Dutch Republic and the Idea of Freedom,' in David Wootton (ed.), *Republicanism, Liberty, and Commercial Society, 1649–1776* (Stanford: Stanford University Press, 1994), 310–40 at 318.

163 Tony Claydon, *William III and the Godly Revolution* (Cambridge: Cambridge University Press, 1996), 11–12 and 142–44.

164 In contradistinction to the quasi-Absolutist Tories, the Whigs 'admired the example of the United Provinces and strove to make Britain as like them as possible. They argued that Dutch commercial success was primarily the product of their polity, and that where absolute monarchy and religious uniformity choked economic progress, republican government and religious toleration were conducive to growth.' William Speck, 'Britain and the Dutch Republic,' in Karel Davids and Jan Lucassen (eds), *A Miracle Mirrored: The Dutch Republic in European Perspective* (Cambridge: Cambridge University Press, 1995), 173–95 at 193.

165 Ibid. 194. These trends were only re-enforced by the Bourbon recognition of James III as the rightful King of England in 1701, consistent with the principle of patrimonialism. Unlike the patrimonial Tories, the Whigs 'regarded both the acceptance of the will

to broadcast the Whig interpretation of the international scene and to explain to the public that the freedom of commerce, the Protestant religion, and the balance of Europe would be lost if France were to gain control over all the Spanish dominions.¹⁶⁶ The commercial republic also served as the historical arc linking the early development of merchant Capitalism with its later Liberal forms, as exemplified by the republican theorists of the Scottish Enlightenment of the later 18th century, Adam Ferguson¹⁶⁷ and Adam Smith¹⁶⁸ in particular. If we were to look forward beyond the parameters of this volume, we would be interpreting Republicanism as the discursive formation governing the transition from the Dutch to the British cycles of systemic accumulation. If, however, we remain within the present contours and focus upon the *histoire evenmentielle* of the Grotian Moment, we would situate the Republicanism of the Grotian juvenilia as operating within the historical contours of the 'double movement' governing the shift from the Genoese to the Dutch cycle. Discursive formation(s) and institutional re-organisation(s) complement each other perfectly; the structural arc of historical continuity is the movement between Amsterdam and Venice.

and the recognition of "James III" as evidence of Louis XIV's drive for universal monarchy and the threat this posed to the liberties of Europe.' Ibid.

- 166 H.D. Schmidt, 'The Establishment of "Europe" as a Political Expression', *Historical Journal*, 9/2 (1966), 172–8 at 177.

The study of English and continental political pamphlets, state papers, and official pronouncements offers conclusive evidence that the term Europe established itself as [the] expression of supreme loyalty in the fight against Louis XIV. It was associated with the concept of a balanced system of sovereign states, religious tolerance, and expanding commerce... The triumph of William III and the Grand Alliance against Louis XIV, associated as he then was... with the ambitious aims of setting up a universal monarchy and a united Catholic Christendom, brought about the first major stage in the long process of western secularisation, the exchange of *Europe* for *Christendom* as supreme political collectivity.

Ibid. 178.

- 167 Marco Geuna, 'Republicanism and Commercial Society in the Scottish Enlightenment: The Case of Adam Ferguson', in Martin van Gelderen and Quentin Skinner (eds), *The Values of Republicanism in Early Modern Europe* (vol. ii of *Republicanism: A Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 177–95, *passim*; Fania Oz-Salzberger, 'Scots, Germans, Republic and Commerce', in Martin van Gelderen and Quentin Skinner (eds), *The Values of Republicanism in Early Modern Europe* (vol. ii of *Republicanism: A Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 197–226 at 197–211.
- 168 Donald Winch, 'Commercial Realities, Republican Principles', in Martin van Gelderen and Quentin Skinner (eds), *The Values of Republicanism in Early Modern Europe* (vol. ii of *Republicanism: A Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 293–310, *passim*. Looking beyond the 18th century, Winch persuasively suggests that 'we need to consider the relationship between republicanism and such potent political developments as liberalism, representative democracy, industrial capitalism and socialism.' Ibid. 310.

The United Provinces, ‘a replica of the Venetian capitalist oligarchy,’ served as a veritable ‘nursery’ for the development of the post-Machiavellian Civic Humanism;¹⁶⁹ there were certain structural differences, however.¹⁷⁰ First of all, the Venetian trade network—and corresponding hegemony—was wholly regional, this within the outermost confines of the late medieval European world system.¹⁷¹ Holland was the first successful global hegemon, achieving a truly worldwide network through constructing and monopolising an initially non-territorial polity. This was coupled with the simultaneous successful transition to an early mode of Capitalism, signified by the pivotal institutional innovation of the joint-stock company model of corporate personality and economic management; ‘in 1650, the centre of the world was tiny Holland, or rather Amsterdam.’¹⁷² Secondly,

169 Tuck rightly sees Grotius’ republicanism as absolutely central to his work. ‘As a young man, Grotius participated in the development of a theory of republican liberty appropriate to the post-Tacitean age, and to the circumstances of an imperialist republic, his native United Provinces.’ Tuck, *Philosophy and Government 1572–1651*, 154. Given the extreme parochialism of Grotius’ patriotism, however, Tuck may have more accurately stated ‘his native *Holland*’. See below, this chapter. Gelderen has drawn attention to the pivotal role played by jurists, in both France and Holland, in formulating republican ideology. Van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590*, 172–4.

170 Like Venice, Amsterdam

was a bearer of a capitalist logic of power and, as such, a leader in the management of the balance of power and in diplomatic initiatives and innovations. Unlike [Venice], however, it was a product rather than a factor in the quantum leap in the European power struggle prompted by the emergence of capitalist states in northern Italy. This difference had several important consequences.

Giovanni Arrighi, ‘The Three Hegemonies of Historical Capitalism,’ *Review*, 13/3 (1990), 365–408 at 382.

171 ‘The wealth and power of Holland, in contrast, was based on commercial and financial networks that the Dutch capitalist oligarchy had carved out of the seaborne and commercial empires through which the territorialist rulers of Portugal and Spain had superseded the wealth and power of Venice.’ *Ibid.*

172 Braudel, *The Perspective of the World*, 91.

Finance capitalism was no newborn child of the 1900s; I would even argue that in the past—in say Genoa or Amsterdam—following a wave of growth in commercial capitalism and the accumulation of capital on a scale beyond the normal channels for investment, finance capitalism was already in a position to take over and dominate, for a while at least, all of the activities of the business world.

Ibid. 604. See Jan de Vries and Ad Van Der Woude, *The First Modern Economy: Success, Failure, and the Perseverance of the Dutch Economy, 1500–1815* (Cambridge: Cambridge University Press, 1997), 693–4:

The United Provinces can lay claim to being the first modern economy by virtue of continuity (it has been a modern economy ever since) and by virtue of its leadership in establishing the conditions of economic modernity over much of Europe. It became not only the commercial entrepot for Europe; it also achieved Europe’s highest overall level of total factor productivity for the better part of the seventeenth and eighteenth

Amsterdam was better placed than Venice to undertake a more effective military resistance to the territorial hegemony of Portugal/Rome. The Protestant Reformation served as the sectarian expression for Dutch national independence, enabling successful interstate competition with Iberia. With Protestantism established as an instrument of national self-determination, Holland was able to place itself at the centre of a highly effective network of anti-Catholic/Habsburg military alliances, orchestrating a new interstate equilibrium, or balance of power: 'The Dutch capitalist oligarchy had a strong common interest with the emerging dynastic states in the liquidation of the claims of pope and emperor to a suprastatal moral and political authority as embedded in the imperial pretensions of Spain.'¹⁷³ Holland's dual role as both guarantor of the balance of power and the champion of political and religious 'freedom' was commensurate with its World-System role as hegemon, over-arching geo-political stability being a necessary precondition for successful hegemonic domination. Members of the Dutch oligarchy 'constantly sought ways and means to prevent conflict from escalating beyond the point where the commercial and financial foundations of their wealth and power could be seriously undermined.'¹⁷⁴ Third, thanks in part to the revival of classical learning—itself a key signifier of Civic Humanism—the Dutch were able to achieve a revolution in military tactics,¹⁷⁵ which were effectively subsidised by the 'capital intensive' nature of the Dutch economy.¹⁷⁶ Fourth, and perhaps most important, the interstate hegemonic rivalry necessitated a correlative transformation in *intra-state* constitutional governance, yielding a dramatic enhancement of Dutch state-making capabilities. Internal constitutional stability and a strict anti-sectarianism¹⁷⁷—both the products of a Polybian theory of

centuries. That is, it became the first... 'lead country', operating nearest to the technological frontier and doing most to define that frontier.

'Dutch world trade became a sort of precious vital fluid which kept the machine [of the World-Economy] going.' Immanuel Wallerstein, *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974), 214.

173 Arrighi, 'The Three Hegemonies of Historical Capitalism', 383.

174 Ibid.

175 'By rediscovering and bringing to perfection long-forgotten Roman military techniques, Maurits of Nassau, Prince of Orange, achieved for the Dutch army... of the early seventeenth century what scientific management would achieve for US industry two centuries later.' Ibid. Peter J. Taylor, 'Ten Years That Shook the World? The United Provinces as First Hegemonic State', *Sociological Perspectives*, 37/1 (1994), 25–46 at 29–31. Prince Maurits was a dedicated reader of Justus Lipsius and may have derived some of his martial innovations from the Humanist. Tuck, *Philosophy and Government 1572–1651*, 61. See Gerhard Oestreich, *Neostoicism and the Early Modern State*, ed. Brigitta Oestreich and H.G. Koenigsberger (Cambridge: Cambridge University Press, 1982), 77–9.

176 Hart, 'The Dutch Republic', 67–76.

177 J.C. Boogman, 'The Union of Utrecht: Its Genesis and Consequences', *Bijdragen en meddelingen betreffende de geschiedenis der Nederlanden*, ND 94, 377–407 at 379–80

checks and balances—were both indispensable to the neutralisation of domestic political conflict, providing the United Provinces with the political institutions necessary to successfully prosecute their military struggle against Spain. Duke has helpfully pointed out the ‘double-faced’ nature of Dutch Protestantism in this regard.¹⁷⁸ Although Calvinism was a primary motor of the Dutch War of National Liberation¹⁷⁹ only a minority of the population was Protestant. The clear majority of the general population and, most importantly, the absolute majority of the urban patriciate—‘*la plus saine et plus riche partie*’ as Oldenbarnevelt called them—remained within the orbit of Roman Catholicism.¹⁸⁰ Both the anti-monarchism and the synodal organisation of the Low Churches proved indispensable to the successful prosecution of the war;¹⁸¹ yet the preponderance of the ‘artisanal’ elements within the Dissenting churches,¹⁸² coupled with the Calvinist demands for the establishment of a unified national Church¹⁸³ provided the groundwork for interminable political conflict. The immediate solution to both the sectarian and the political problem—virtually identical— was to constitutionally guarantee both the confessional self-determination of the provinces united together in a federalist system as well as a (restricted) right to private religious conscience, a degree of protection of religious toleration a key sign of republican *libertas*.¹⁸⁴

Although not a ‘formal’ political treatise, *De Indis* is infused with a cognisably republican ideology; for van Gelderen, the Text ‘is principally a treatise on the

and 383–89. The essence of the foundational Union of Utrecht lay within Art. 13, ‘that each province was permitted to conduct its religious affairs according to its own wishes, provided that freedom of conscience was maintained.’ Ibid. 386.

178 Alastair Duke, *Reformation and Revolt in the Low Countries* (London: Hambledon and London, 2003), 269–93.

179 ‘In the Low Countries... the Reformation lies in the shadow of the Revolt.’ Ibid. ix.

180 Ibid. 269.

181 Ibid.

182 Ibid. 14–15.

183 Ibid. 3.

184 For anti-sectarianism and religious freedom in English Republicanism see Simone Zurbuchen, ‘Republicanism and Toleration,’ in Martin van Gelderen and Quentin Skinner (eds), *The Values of Republicanism in Early Modern Europe* (vol. ii of *Republicanism: A Shared European Heritage* (Cambridge: Cambridge University Press, 2002), 47–83, *passim*. In the Netherlands, the decisive moment was reached with Spinoza in the mid-17th century, who posited the establishment of a national civic religion, based upon the freedom of conscience, as the basis of a ‘drastic weakening of ecclesiastical authority and the merging of it as far as possible into the political sovereign.’ Jonathan Israel, ‘Spinoza, Locke and the Enlightenment Battle for Toleration,’ in Ole Peter Grell and Roy Porter (eds) *Toleration in Enlightenment Europe* (Cambridge: Cambridge University Press, 2000), 102–13 at 105. However, as early as 1579, the anonymous Dutch text *Een geode vermanighe* declared that

Everyone knows that the liberty of humans lies above all in the soul, which is our principal part, and because of which we are called human. The liberty of the soul is the freedom of the conscience, which consists in a person being allowed to take up and

origins, principles and limits of civil power.¹⁸⁵ While *De Indis*' historical connection to the VOC makes it tempting to apply Macpherson's theory of 'possessive individualism',¹⁸⁶ it is more persuasive to interpret *De Indis* in political rather than in determinative economistic terms; Grotius' 'elucidation of the laws of nature served to explain the origins of civil power,' not of *homo oeconomicus*.¹⁸⁷ As we have already discussed in Chapter Four, the political/public and the economic/private are iterable categories of construction, both exercising the capacity for structural power; neither must be read as the reduction of the other. Accordingly, for Tully

The thesis of possessive individualism misidentifies the primary problems [17th century] theorists were facing. They were not concerned with justifying unlimited accumulation in a market society but with more basic political problems of political order, preservation, state-building and liberty in a situation of insecurity brought on by a century of civil wars, religious wars, the Thirty Year's War, and the European wars of the latter half of the seventeenth century.¹⁸⁸

Grotian discourse, predicated upon the heterogenous logic of metaphysical inversion and iterability, facilitates the 'inter-exchangeability' of the VOC, Holland, and the United Provinces, as expressed through the political logic of Divisible Sovereignty. Both the VOC and *ius/proprietas* act as the transferable 'signs' of the World-Economy, the iterable expression of the early phase of the interstate Modern World-System. Within the discursive framework of *De Indis*, *ius/proprietas* operate as 'signs' of international legal personality, signifying the iterable relationship between 'Person' and 'State' through the proprietary construction of the 'sovereign' as 'owner'.¹⁸⁹ The VOC as a bearer of the requisite 'marks of sovereignty' signifies the potentially invertible relationship between 'markets' and 'persons' within the Modern World-System, subject to the 'private' economic rationality of ceaseless accumulation within the World-Economy. Pace Teschke, the VOC was

keep the religion his conscience guides him to, with no one having the right or power to prohibit or hinder him in this.

Cited in van Gelderen, 'The Machiavellian Moment and the Dutch Revolt', 218.

185 Van Gelderen, 'Aristotelians, Monarchomachs and Republicans', 202. Compare van Gelderen to Tuck, who identifies *De Indis* as the locus of 'the first modern political theory'; Tuck, *The Rights of War and Peace*, 232.

186 See C.B. Macpherson, *The Political Theory of Possessive Individualism: From Hobbes to Locke* (Oxford: Clarendon Press, 1961), 1–8. For critique, see David Miller, 'The Macpherson Version', *Political Studies*, 30 (1982), 120–7, *passim*.

187 Van Gelderen, 'Aristotelians, Monarchomachs and Republicans', 202.

188 James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 77–8. 'Rather than power being valued as a means of obtaining wealth, wealth was valued as a means of obtaining power.' Miller, 'The Macpherson Version', 123.

189 See above, Chapter Four.

not a 'producer' in the contemporary sense of industrial economy, but an institutionalised regulator of a 'mode of trade/exchange', exerting both de facto and de jure powers of *dominium* and *imperium* within the World-Economy.¹⁹⁰

Ultimately, *De Indis* works to fracture the monistic unity of geo-political space, signifying a shift from *monarchia universalis* to the 'internationalisation' of a discernible 'maritime republican tradition' of political organisation.¹⁹¹ Once again, in language and imagery directly reminiscent of the Althusian symbiote

This need [for a new international order] was especially urgent in view of the increasing number of human beings, swollen to such a multitude that men were scattered about with vast distances separating them and being deprived of opportunities for mutual benefaction. Therefore, the lesser social units began to gather individuals together into one locality, not with the intention of abolishing the society which links all men as a whole, but rather in order to fortify that universal society by a more dependable means of protection, and at the same time, with the purpose of bringing together under a more convenient arrangement the numerous different products of many person's labour which are required for the uses of human life. For it is a fact... that when universal goods were separately distributed, each man's ills pertain to him individually, whereas, when these goods are brought together and intermingled, individual ills cease to be the concern of any one person and the goods of all pertain to all. In this matter, too, as in every other, human diligence has imitated nature, which has ensured the preservation of the universe by a species of covenant binding upon all of its parts. Accordingly, the smaller social unit, formed by a general agreement for the sake of the common good—in other words, this considerable group sufficing for self-protection through mutual aid, and for equal acquisition of the necessities of life—is called a commonwealth [*Respublica*]; and the individuals making up the commonwealth are called citizens [*cives*]. This system of organization has its origin in God the King, who rules the whole universe and to whom... nothing on earth is more acceptable than those associations and assemblies of men which are known as states [*civitates*]. According to Cicero, Jupiter himself sanctioned the following precept, or law: All things salutary to the commonwealth are to be regarded as legitimate and just.¹⁹² There is agreement on this point, moreover, among almost all peoples.¹⁹³

An international system of republican *liberum commercium* is replicated within the manifold municipal spheres, yielding a perfect iterability between the interstate and intra-state levels of a cognisable World-System.

In addition to the common opinion of mankind, another factor has played a part; the will of individuals, manifested either in the formal acceptance of pacts, as was originally

190 Jonathan I. Israel, *The Dutch Primacy in World Trade* (Oxford: Oxford University Press, 1982), 38–120.

191 Taylor, 'Ten Years That Shook the World?', 36–43.

192 *Ius gentium primum*.

193 *Ius gentium secundarium*.

the case, or in tacit considerations of consent, as in later times, when each individual attached himself to the body of a commonwealth, even though it is composed of different parts, constitutes by virtue of its underlying purpose a unified and permanent body, and therefore the commonwealth as a whole should be regarded as subject to a single law.¹⁹⁴

Not universal *Civitas*, as the Habsburgs would have, but republicanism and Divisible Sovereignty as a mode of geo-political relationships that would serve as the apologetic basis of the World-Economy. The tremendous conceit lying at the centre of Humanist discourse as deployed by Grotius is the 'thin' metaphysical inversion of the intra- and interstate realms, international balance of power acting as the necessary 'external equivalent of mixed government.'¹⁹⁵ Grotian iterability provides the necessary linkage between Republicanism and the 'privatisation' of international personality.

IV *De Republica Emendanda*: Divisible Sovereignty, Iterability, and Intra-state Relations

[The Dutch Republic] cannot properly be styled a commonwealth, but is rather a Confederation of Seven Sovereign Provinces united together for their common and mutual defence, without any dependence one upon the other. But to discover the nature of their government from the first springs and motions, it must be taken yet into smaller pieces, by which it will appear that each of these Provinces is likewise composed of many little States or Cities, which have several marks of Sovereign Power within themselves, and are not subject to the Sovereignty of their province.

(William Temple)

It must never be forgotten that the political elites who lived through the Dutch Revolt, thoroughly educated and trained in the tradition of Humanism, understood their own times in terms of the radical dangers and uncertainties of the revolutionary cycle classically described by Polybius. The highly experimental, if not overtly self-conscious nature of the Civic Humanist practice of authoring self-grounding constitutions is clearly evidenced in *De Republica emendanda* (c. 1600), one of Grotius' earliest political treatises. Throughout the history of the Netherlands, or 'Batavia', writes Grotius, 'There have been differences of opinion both in discussion and in writings as to how we should establish our republic.' The

194 Hugo Grotius, *[De Indis] De Iure Pradae Commentarius. Commentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (London: Wildy & Sons, 1964), 19–20.

195 Bouwsma has made this point explicit. 'The mixed constitution thus occupied much the same place in the structure of internal politics as the balance of power in international affairs; its principle of operation is identical.' William J. Bouwsma, *Venice and the Defence of Republican Liberty: Renaissance Values in the Age of the Counter Reformation* (Berkeley: University of California Press, 1968), 17.

Author clearly situates his own Text within this selfsame series of 'so many and radical experiments',¹⁹⁶ proposing a solution the practical problems of republican governance of an aristocratic constitution¹⁹⁷ accompanied by a high degree of political centralisation¹⁹⁸ 'by way of experiment.'¹⁹⁹ The two outstanding discursive features of *De Republica emendanda* is that it is a strongly Civic Humanist Text²⁰⁰ and is expressly Calvinist,²⁰¹ adopting the rhetoric and imaginary of covenantal politics.²⁰² The relationship between Humanism and political centralisation is, of course, not an accidental one; the unitary nature of the *civitas* along with the juridical preference for Civil or Positive Law are two of the primary signs of classical, or Aristotelian, Republicanism. Accordingly, monarchy is rejected²⁰³ in favour of the Polybian notion of the 'mixed constitution'²⁰⁴ centred upon the constitutional primacy of aristocratic government; 'it would seem that the republic that is most properly organised is the one in which the prominent role has been entrusted to a proportionate number of men of outstanding virtue and wisdom, on the understanding, however, that percentage and property may also have a say in the matter.'²⁰⁵ The overt reference to the propertied urban patriciate of Holland notwithstanding, *De Republica emendanda* is a thoroughly Polybian Text; an 'aristocracy seems to suit the nation best which loves its freedom as much as it shows respect to virtue; and experience teaches us that whenever a nation shakes

196 Arthur Eyffinger et al., 'De Republica Emendanda; a Juvenile Tract by Hugo Grotius on the Emendation of the Dutch Polity', *Grotiana*, New Series, V (1984), 1–135 at 107. [Hereafter, Grotius, *De Republica emendanda*.]

197 Ibid. 81–5.

198 Ibid. 113–19.

199 Ibid. 119–21.

200 Arthur Eyffinger, 'Introduction', in Grotius, *De Republica emendanda*, 5–56 at 16–32.

201 Ibid. 17.

202 This is best illustrated by the Text's extensive discussion of Mosaic Law and the ancient Hebrew constitution; 'it is as likely as not that it was primarily political motives, prompted by the social and ecclesiastical climate in the increasingly Calvinistic provinces, that was its mainspring.' Ibid.

203 Grotius, *De Republica emendanda*, 87–93.

204 'Most sensible, indeed, are they who insist on a certain combination of these [governmental forms] in the sense that a single state embraces the majesty of the prince, the authority of a senate, and the freedom of the people.' Ibid. 81. As Van Gelderen has remarked,

if it is the essence and defining characteristic of the republican philosophy of liberty that, unless a commonwealth is maintained in a state of freedom, its inhabitants will lose their personal liberty, and that to preserve the liberty of the commonwealth good laws, proper institutions and civic virtue are required, the philosophy of liberty as developed during the Dutch Revolt with regard to the Dutch political order is principally republican in character.

Gelderen, 'The Machiavellian Moment and the Dutch Revolt', 217 fn. 65.

205 Ibid.

off the yoke of tyranny, this is the most likely variant to replace it.²⁰⁶ Compare this language with Polybius' account of aristocratic revolution provided in Book VI of *The Rise of the Roman Empire*.

Once the people had found their leaders they gave them their support against their rulers... with the result that kingship and monarchy were swept away and in their place the institution of aristocracy came into being and developed. The people, as if discharging a debt of gratitude to those who had overthrown the monarchy, tended to place these men in authority and entrust their destinies to them. At first the aristocrats gladly accepted this change, made it their supreme concern to serve the common interest, and handled both the private and public affairs of the people with the greatest care and solicitude.²⁰⁷

What provides the most vital link between Polybius and an oligarchic writer such as Grotius is that the political revolutions that both describe are populist uprisings that are driven 'from below'. In the case of the Lowlands, these are centred upon the middle-class *populares* organised into corporate guilds and waging a form of 'class warfare'²⁰⁸ against both the Spanish occupiers and the urban *regenten*.²⁰⁹ The essential 'balancing act' that must be performed is to secure the unquestioned benefits of national independence while self-consciously authoring the constitutional foundations of political stability in the face of the constant threat of democracy, or 'the rule of the mob'.²¹⁰ In this regard one of the crucial innovations of *De Republica emendanda*, the rejection of the confederacy by

206 Ibid. p. 83.

207 Polybius, *The Rise of the Roman Empire*, 308.

208 Intriguingly identified by Boone and Prak as 'the Little Tradition' of urban revolt. See Marc Boone and Maarten Prak, 'Rulers, Patricians and Burghers: the Great and the Little Traditions of Urban Revolt in the Low Countries', in Karel Davids and Jan Lucassen (eds), *A Miracle Mirrored: The Dutch Republic in European Perspective* (Cambridge: Cambridge University Press, 1995), 99–134, *passim*. We know that during the early 16th century, a specifically Catholic form of urban Republicanism had developed. Karin Tilmans, 'Republican Citizenship and Civic Humanism in the Burgundian-Habsburg Netherlands (1477–1566)', in Gelderen and Skinner (eds), *Republicanism and Constitutionalism in Early Modern Europe*, *passim*. 'It appears, therefore, that there is a strong continuity of civic or republican discourse extending from the sixteenth- to the seventeenth-century Netherlands. The ideological force of sixteenth-century civic humanism in state formation seems so far to have been underestimated.' Ibid. 124.

209 Boone and Prak, 'Rulers, Patricians and Burghers', 100–1 and 103–4. See also Geoffrey Parker, *The Dutch Revolt*, 2nd edn (Harmondsworth: Penguin Books, 1985), 146–7, 194 and 245–7, describing the centrality of the 'Little Tradition' of urban revolt.

210 On the inherent political conservatism of the constitutional arrangements resulting from the Dutch Revolt, see Herbert H. Rowen, *The Rhyme and Reason of Politics in Early Modern Europe: Collected Essays of Herbert H. Rowen*, ed. Craig E. Harline (Dordrecht: Kluwer Academic Publishers, 1992), 45–59.

means of the strengthening of national executive power, becomes more readily intelligible. The essence of Grotius' critique of the constitution of the early Dutch Republic is the unbridled authority and autonomy of the provinces, governed by exclusively particularist interests.

What I have just said about each province separately also holds true for the union of all provinces. Here, too, the preponderance in the administration of those who are virtually held under obligations by directives from their own provinces makes itself felt to the detriment of the authority of the Council of State (*senatus*), the body that attends to what is the highest common interest. And there is yet another reason for this body's disintegration, which is that it is neither held together by judicial proxy nor by a sort of prefect, who could be the living embodiment of its unity [*praefecto aliquo, tanquam viva unitatis imagine*].²¹¹

Although Grotius does not employ the language of Aristotle directly, it is not difficult to discern the presence of the classical republican theme of subordinating passions and self-interest to reason and common purpose. The experimental solution proposed, therefore, is to considerably enhance the political power of the national executive at the expense of the particularistic provincial assemblies.

Political theorists teach us that a republic should have the quality of self-sufficiency [*ipsi sufficiat*]²¹² and that although its proper size is hard to determine exactly, it is often easy to perceive what is superfluous or lacking in its constitution. Both the underlying theory of our provinces and their very geographical situation are such that for its defence and survival the one province is dependent upon the other. This is why it is in fact imperative that they are mutually united by a very close and permanent bond—in fact the contrary to the present situation; for now the only reason why they stick together at all is their fear of the enemy at the moment, and once this fear has gone the alliance will fall apart. Even the war itself, mind you the very thing which unites them, is not being conducted with the common interest in mind. For the authority of the Council of State is frustrated by the presence of the delegates from the separate provinces who, as they are all bound to keep an eye on the specific interests of their own provinces, cannot possibly have the impartiality at the conference-table that they ought to have. Indeed, if by chance they do decide on something of general applicability, then this decision is often overruled by the heads of the separate provinces. And this is a sign that not only is this not a united republic—since every province itself clearly possesses the full rights of a republic—the confederacy is not firmly enough established to keep them together.²¹³

The proper republican subordination of private to public interest is most urgent in regards to the successful conduct of the national war of liberation, the collec-

211 Grotius, *De Republica emendanda*, 113.

212 An implicit reference to *libertas* as the opposite of servitude and dependency.

213 Ibid. 115.

tive effort to thwart servitude and guarantee *libertas*. As is always the case with the juvenilia, behind Grotius we detect the 'trace' of Oldenbarnevelt. As has been remarked many times, it is not too difficult to imagine the historical personage of the Land Advocate of Holland as the idealised exemplar of the 'experimental' chief executive.

I am of the opinion that the council, presided over by the highest prefect acting at the same time as commander-in-chief [*summus praeфекtus idemque belli imperator*], should comprise the best men from all provinces and that where the Hebrews have their priests, we should choose most pious men who at the same time have ample experience in matters of church administration. In addition, this council should have authority to enact laws on whatever subject and to rule all men; it should take decisions in matters of war, peace and alliances of its accord, provided always that it is convinced that on these major issues it would be wisest to consult the Assembly of the States, so that if any dissenting views are voiced, they will be given full consideration.²¹⁴

Numerous scholars have had serious reservations in attributing *De Republica emendanda* to Grotius as its highly centralised Federalism is at such fundamental variance with his otherwise staunch support of the rights of the provinces.²¹⁵ However, as Roelofsen reminds us, experimental constitutional reform programs 'like those sketched by Grotius were... not unusual at the time. Indeed, even Oldenbarnevelt seems to have toyed with similar ideas.'²¹⁶ We know that Oldenbarnevelt convened 'two secret deliberations' concerning the constitution in 1602 and 1603; also discussed at these clandestine sessions were the imminent incorporation of the disparate *voorscompagnie* into the centrally integrated VOC.²¹⁷ It appears a plausible inference that contemporary dissatisfaction among the Dutch political elites with the progress of the war of national liberation expressed itself in the demand for a constitutional shift away from con-federalism and towards a more politically centralised—and, therefore, a more militarily efficient—federal State. It is also by no means impossible that the Grotian proposal, premised upon the constitutional bolstering of the executive power of the thinly disguised Land Advocate of Holland, was intended to provide a more orthodox republican alternative to the quasi-monarchical option represented by the Orangist Stadholder of

²¹⁴ Ibid. 117.

²¹⁵ 'The criticism in his manuscript *De Republica emendanda* directed against the preponderant position of the Provincial States and favouring a stronger federal government, makes rather odd reading if one considers Grotius' later impassioned defence of provincial sovereignty.' C.G. Roelofsen, 'Grotius and the International Politics of the Seventeenth Century', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 95–131 at 103.

²¹⁶ Ibid.

²¹⁷ Jan den Tex, *Oldenbarnevelt*, 2 vols, ii (Cambridge: Cambridge University Press, 1973), 413.

Holland, Zeeland and Utrecht Prince Maurits of Nassau (1567–1625).²¹⁸ Although my point is speculative, it does fit in well with the marked Calvinism of the Text, a form of Protestantism that Grotius was otherwise wholly adverse to. By attempting to establish the covenantal basis for the centralised republican State Grotius could simultaneously neutralise the political ambitions of the Orange dynasty while undercutting the corporatist political demands presented by the synodal organisation of the Low churches; as Blom has perceptively commented, in this way ‘the Calvinist theory of resistance had developed into a Republican absolutism.’²¹⁹ It follows from Grotius’ critique that, contrary to general perceptions, the United Provinces in their current form do not constitute a ‘true’ *respublica* but, instead, a mere ‘confederation’.

I believe that many people who are not well acquainted with our political status imagine that what we call the United Provinces, forms a single and true republic, just as the twelve tribes of Israel constitute one republic: but things are in fact quite different. For they do not form a republic, but only a confederacy, an alliance and a unity in the event of war contained in certain paragraphs which themselves are not duly observed either [*Sed aliter se res habet: neque enim republica est, sed fedus tantum et belli societas atque communio, certis capitibus comprehensa—quae nec ipsa satis observantur*].²²⁰

It as though by the heterogenous political pluralism of the United Provinces categorically belies the unitary monism of *civitas*.

The issue of whether the United Provinces constituted a federal—or, in Grotius’ terms, a ‘true’—republic is one of central importance to an overall interpretation of the Grotian corpus. It is precisely this need to formulate a juro-political discourse commensurate with a republican State that is incorporated

218 Velema has persuasively argued that political resistance to Orangist dynastic ambitions, coupled with perennial uncertainty over the precise constitutional powers and privileges of the Stadholder, accounts for the systemic ‘anti-monarchism’ of Dutch Republicanism. Wyger R.E. Velema, ‘“That a Republic is Better than a Monarchy”: Anti-Monarchism in Early Modern Dutch Political Thought’, in Martin van Gelderen and Quentin Skinner (eds), *Republicanism and Constitutionalism in Early Modern Europe* (vol. i of *Republicanism: a Shared European Heritage*) (Cambridge: Cambridge University Press, 2002), 9–25 at 10–11.

Despite or because of the opaque nature of their position, the Stadholders, elected by each province separately, succeeded in accumulating a considerable amount of symbolic and real power on both the national and the provincial level. Particularly important in this respect was the fact that their function combined substantial political power and the supreme military command in one and the same person.

Ibid. 11. For a general discussion of the intractable problem of constitutional uncertainty, see Rowen, ‘The Dutch Republic and the Idea of Freedom,’ *passim*.

219 H.W. Blom, ‘“Our Prince is King!”: The Impact of the Glorious Revolution on Political Debate in the Dutch Revolt,’ *Parliaments, Estates and Representation*, 10/1 (1990), 45–58 at 47.

220 Grotius, *De Republica emendanda*, 113.

along essentially *con-federal* principles that makes necessary a rhetorical shift from unitary Civic Humanism to heterogenous Late Scholasticism. As Blom has candidly admitted, it 'seems inadequate to label the Republic a federal state, if only because it possessed no detailed regulation of the respective rights and duties of its different parts.'²²¹ Blom is not alone in his dilemma; in the Preface to the third edition of his *Politica*, Althusius clearly refers to the United Provinces as a confederacy.²²² From the perspective of World-System Analysis, the historical paradox is that the United Provinces appears to have been a 'weak' State and, therefore, unsuited for hegemony: for Wallerstein, the Netherlands possessed 'a jerry-built and seemingly ineffectual state machinery.'²²³ The 'solution' lies within the heteronomous logic of World-System Theory. 'Strong' States are not those most efficient in centralising political power, but those most effective at generating surplus accumulation within the Capitalist World-Economy. It was precisely because the Dutch Republic 'was a typical example of state-making in a capital-intensive region'²²⁴ that it proved to be competitively successful against Iberia.

It seems misplaced to speak of a strong state... among the multiple mercantile and entrepreneurial factions within the Netherlands. No powerful central institutions existed which acted as an arbiter deciding what... 'vital interests' should look like and Dutch policies... were determined by continuously changing coalitions of provinces, cities, and factions. Thus, despite long and expensive wars, despite a hegemonic position in the world of the seventeenth century, and despite advanced methods in military organization and finance,²²⁵ no powerful structures were imposed by 'The Hague', the meeting place of the representatives of the seven provinces in the Estates General. This theoretical imbroglio calls for a re-formulation of the causal regularities that underlie the histories of states.²²⁶

²²¹ Hans W. Blom, 'The Republican Mirror: The Dutch Idea of Europe', in Anthony Pagden (ed.), *The Idea of Europe: From Antiquity to the European Union* (Cambridge: Cambridge University Press, 2002), 91-115 at 97.

²²² 'To demonstrate this point [of republican sovereignty] I am able to produce the excellent example of your own and the other provinces confederated with you.' Althusius, *The Politics of Johannes Althusius*, 10.

²²³ Wallerstein, *The Modern World-System II*, 167.

²²⁴ Marjolein't Hart, 'Intercity Rivalries and the Making of the Dutch State', in Charles Tilly and Wim P. Blockmans (eds), *Cities & the Rise of States in Europe, A.D. 1000 to 1800* (Oxford: Westview Press, 1994), 196-217 at 211.

²²⁵ Self defence formed the basis of Dutch *raison d'état*: the United Provinces 'must first of all be considered as a close and permanent defensive alliance: vis-à-vis the outside world the united provinces would act "as if they constituted only a single province."' Boogman, 'The Union of Utrecht', 386.

²²⁶ Marjolein't Hart, *The Making of the Bourgeois State: War, Politics and Finance During the Dutch Revolt* (Manchester: Manchester University Press, 1993), 6. Blockman has

Insofar as it is subject to historical ‘retrieval’, the Dutch Republic appears to have been subject to a kind of ‘informal governance’,²²⁷ based upon the extra-constitutional convergences among the class interests of the political and mercantile elites—who were, in most instances, virtually one and the same²²⁸—centred upon the world-city of Amsterdam.

While the principle of equal representation in the States General for every province regardless of wealth or the size of its financial contribution [to the war effort] remained inviolable, the principle of provincial autonomy could be used not only to protect Holland from being outvoted and subjected to the will of the smaller provinces, but in practice to impose Holland’s will on the rest. In brief, provincial independence gave the lesser provinces protection from their powerful allies and at the same time allowed

argued that Dutch republicanism emerged out of an earlier tradition of regional revolt throughout the Low Countries during the Late Middle Ages.

The collective experiences of the populations in their struggles with rulers created a pattern of social action, provided models and a programme... It proved to be perfectly adapted to highly urbanised areas with the function of metropolis for the world-economy, a position that Holland took over from Flanders and Brabant at the end of the 16th century. The communal, federative and constitutional model of a political system, as it was carried to its fullest expression in Flanders and Brabant, could be elaborated up to the level of the federation of the Seven Provinces. It was indebted to a strong institutional tradition but the combination with a core position in the world-economy provided the means to stand up against the claims of surrounding monarchies. One could even argue that a loosely structured state was a necessary condition for the functioning core in the pre-industrial capitalist world-economy.

W.P. Blockman, ‘Alternatives to Monarchical Centralization: the Great Tradition of Revolt in Flanders and Brabant’, in H.G. Koenigsberger (ed.), *Republiken und Republikanismus in der Frühen Neuzeit* (München: R. Oldenburg Verlag, 1988), 145–54 at 154.

227 See Hans W. Blom, ‘Patriots, Contracts and Other Patterns of Trust in a Polyarchic Society: the Dutch 17th Century’, in Robert von Friedeburg (ed.), *‘Patria’ und ‘Patrioten’ vor dem Patriotismus. Pflichten, Rechte, Glauben und die Rekonfiguration europäischer Gemeinwesen im 17. Jahrhundert* (Wiesbaden: Harrassowitz Verlag 2005), 193–213, *passim*.

228 Olaf Moerke, ‘The Political Culture of Germany and the Dutch Republic’, in Karel Davids and Jan Lucassen (eds), *A Miracle Mirrored: The Dutch Republic in European Perspective* (Cambridge: Cambridge University Press, 1995), 135–72 at 151:

Local elites, mainly those of the bigger cities, remained the focus of political decision-making. Starting from the local level, decision-making continued in the provincial Estates and in the States General. It is of primary importance that at all those levels one and the same group, the urban or noble *regenten*, held the decisive influence. The process of political decision-making went step by step from the basic local level to the level of the Union. The oligarchy, ruling the bigger cities, ruled the country. Anyone who wanted to influence the Republic’s politics had to strengthen his influence within the basic elite formations.’

Holland to mould the policies of the new state in accordance with its own wishes and needs.²²⁹

Price has mischievously labelled this extra-judicial combination of informal with formal techniques of political control as 'typically Dutch'²³⁰ and identified it as the centrepiece of the Land Advocate of Holland's strategy of governance; 'If there was one principle that underlay the whole of van Oldenbarnevelt's internal policy, it was provincial autonomy which enabled Holland to dominate the political life of the Republic.'²³¹ This 'typically Dutch' mode of governance seemed to have remained constant throughout the Dutch cycle of systemic accumulation.²³² What I would like to suggest is that it was precisely the two-fold dimension of the United Provinces within the Modern World-Economy—the status of Amsterdam as the premier world-city of the Capitalist World-Economy and the convergence of all vital economic and political interests of the urban patriciate upon this *super-ville*—that not only maintained the 'typically Dutch' practice of obviating constitutional reform but also guaranteed that any political system would be grounded upon con-federal principles and practices. World-Systems Analysis provides us with the means of ultimately resolving the juro-political paradox of the hegemon: that the 'strongest' State within the World-System is constitutionally 'weak'.

Dutch hegemony within the Modern World-System was underpinned by the rigorous iterability between the 'Political' and the 'Economic'; the modern state-system and Capitalism share 'a single, integrated logic'.²³³ The relative 'dis-aggregation' of the United Provinces²³⁴ facilitated the untrammelled operation

229 J.L. Price, *Holland and the Dutch Republic in the Seventeenth Century: the Politics of Particularism* (Oxford: Oxford University Press, 1994), 239. Compare this with Moerke; 'In the Dutch Republic the lasting dominance of Holland also determined the effectiveness of the States General. That dominance could not be questioned by the other provinces. Holland functioned as the political centre for the Republic, not against it' Moerke, 'The Political Culture of Germany and the Dutch Republic', 150.

230 Price, *Holland and the Dutch Republic in the Seventeenth Century: the Politics of Particularism*, 255.

231 Ibid. 272.

232 Van Oldenbarnevelt's 'spiritual successor' the Grand Pensionary Johan de Witt (1625–72)

maintained regular contacts with supporters and clients throughout the voting towns, the nature of which are at least partly revealed in his correspondence, though the short distances between most towns and the Hague meant that this is probably only the tip of the iceberg, as face-to-face contacts are likely to have been far more important than letters.

Ibid. 167–8.

233 Christopher Chase-Dunn, 'Interstate System and Capitalist World-Economy: One Logic or Two?', in W. Ladd Hollist and James N. Rosenau (eds), *World System Structure: Continuity and Change* (London: Sage Publications, 1993), 30–53 at 31.

234 Boxer referred to the United Provinces as a territorial unit based upon 'a purely artificial boundary'. C.H. Boxer, *The Dutch Seaborne Empire 1600–1800* (Harmondsworth:

of Dutch entrepreneurial impulses, re-formulating political negotiation into a network of commercial transactions; 'the economy was a practical reality before it became a political reality.'²³⁵

That which was administratively and politically fragmented possessed an informal unity based on economic relations... Clearly, the Dutch economy became much larger than its land area and native population could support. But if this is so, where does one draw the line between the Dutch economy and the European, indeed, the world economy?... The problem before us is clear. The Dutch Republic exhibited often striking regional differences and held fast to a decentralized political structure at the same time that it performed economic functions on an international stage... Markets, more than politics or culture, articulated the common space of the Dutch people.²³⁶

The intrastate heterogeneity of the Dutch Republic²³⁷ corresponds to the interstate heteronomy of the World-Economy. As discussed in Chapter One, both system levels manifest the political logic of global capitalism; 'the inter-state system itself is the basis of the competitive commodity economy at the system level... the political system of capitalism is not the state, but the larger competitive system of states.'²³⁸

Crucial to the parallel logic(s) of both the intra-and interstate levels is the strict causal correlation between effective global governance and anti-territorialism.

The most successful core nations have achieved their hegemony by having strong and convergent business interests which have unified State policy behind a drive for successful commodity production and trade with world markets... This is not the state-centric system which some analysts have described, because states cannot escape, for long, the competitive forces of the world economy.²³⁹

Penguin Books, 1965), 18. Compare this point with Schama's, that the Dutch Republic constituted 'a politics of contingencies and exigencies that hardened over time into an institutional equilibrium.' Simon Schama, *The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age* (London: Fontana Press, 1987), 62.

235 Vries and Woude, *The First Modern Economy*, 192. 'The Dutch Republic was more like a giant business conglomerate than a political community.' Liah Greenfeld, *The Spirit of Capitalism: Nationalism and Economic Growth*, (Cambridge: Harvard University Press, 2001), 102.

236 Vries and Woude, *The First Modern Economy*, 178–9; Taylor, 'Ten Years That Shook the World?', 31–3.

237 'All of the component provinces of the Dutch Republic were themselves federations in miniature, in which the decision-making power was shared among locally powerful constituencies.' James D. Tracy, *Holland Under Habsburg Rule, 1506–1566: The Formation of a Body Politic* (Berkeley: University of California Press, 1990), 4.

238 Chase-Dunn, 'Interstate System and Capitalist World-Economy', 35 and 36.

239 Ibid. 41 and 40.

As Grotius himself indicates, the 'strong' Dutch State historically emerged through inevitable competitive rivalry with the Absolutist Hispanic world-empire. 'The cause of the Dutch is more just than that of [a mere] competitor, inasmuch as their own profit is bound up with profit to the entire human race, a universal benefit which the Portuguese are attempting to destroy.'²⁴⁰

The Treaty of Westphalia signified the formal recognition of Dutch hegemony, Holland having subsidised the termination of Habsburg *imperium* within the core zone of western Europe through its superior commercial position within the World-Economy.²⁴¹ In interstate terms, the formalisation of Dutch hegemonic succession signified the transition of the core zone to the 'Westphalian System,' juro-politically legitimated by the Nation-State²⁴² and balance of power.²⁴³ In intrastate terms, Dutch hegemony and global Capitalism committed the Republic to systemic constitutionalism and a rigorous separation of powers, thwarting the Humanist-derived centralising tendencies of *De Republica emendanda*.²⁴⁴

Secular constitutionalism led, in turn, to a rigorous policy of de-centralising political authority; the nullification of the institutional demand for a state religion

240 Grotius, *De Indis*, 260–1. On the ultimate failure of the Habsburgs to maintain Iberia in a sustainable competitive position within global Capitalism, see Wallerstein, *The Modern World-System I*, 164–221. Central to Spain's ultimate defeat in the 17th century were a series of debilitating regional revolts triggered by Madrid's imposition of draconian tax measures to subsidise ultimately unsustainable long-term military expenditures. See Brian M. Downing, *The Military Revolution and Political Change: Origins of Democracy and Autocracy in Early Modern Europe* (Princeton: Princeton University Press, 1992), 227–31.

241 J.V. Polisensky, *The Thirty Year's War* (London: New English Library, 1974), 158.

Without Dutch subsidies and Dutch organizational strength anti-Habsburg resistance during 1621–5 could not have maintained itself; there would have been no coalition of the Hague, no Swedish invasion of central Europe after 1630... Thus we can say that a precondition for the generalizing of the conflict was the presence in early seventeenth century Europe, if not of an economic unity, at least of a framework for exchange and the first signs of a world market.

Holland had achieved de facto independence from Spain by 1609 at the latest, with the negotiation of the Twelve Year Armistice, itself the result of hegemonic rivalry within the Capitalist World-Economy: 'As long as the Dutch navy maintained mastery of the sea, the [Dutch] economy and war finance were secure.' Downing, *The Military Revolution and Political Change*, 226.

242 'The end of the Thirty Year's War consolidated the European system of national states.' Charles Tilly, *Coercion, Capital, and European States, AD 990–1992*, rev. edn (Oxford: Blackwell, 1992), 167.

243 Chase-Dunn, 'Interstate System and Capitalist World-Economy', 45.

244 Arrighi, 'The Three Hegemonies of Historical Capitalism', 384–5.

The state-making capabilities of the Dutch capitalist oligarchy in contrast [to Venice] had been forged in a secular struggle for emancipation from Spanish imperial rule. In order to succeed in this struggle, it had to forge an alliance and share power with dynastic interests (the House of Orange) and had to ride the tiger of popular rebellion (Calvinism).

effectively pre-empted sectarian secession in both Holland and the whole of the United Provinces. As an interstate innovation, anti-sectarianism allowed for massive internal savings, as the political need for a large standing army was obviated.²⁴⁵ A symbiotic process was instigated, with a less armed and, therefore, a less interventionist state actively promoting the exponential growth of free-market capital investment. As Armitage has recently shown, these concerns re-appear throughout the Republicanism of the 17th century; contemporary republican writers perceived a very direct correlation between trade and *libertas* and *libertas* with hegemony.²⁴⁶ A comparison between the hugely successful Dutch East Indies Company and the perennially under-achieving Dutch West Indies Company (WIC) is instructive in this regard;²⁴⁷ the comparatively 'down market' WIC was the preserve of the Calvinist and Orangist Zeelanders. The economic rivalry between the two Companies was an institutionalised continuation of the class and sectarian conflicts between the two regional and political factions.²⁴⁸ It is not coincidental that the most rapaciously brutal and militaristic of the VOC Governor-Generals of Batavia, Jan Coen, was a Calvinist; Coen also spearheaded the inexorable drive towards a fully-fledged 'captive' or mercantilist model of governance of the Spiceries.²⁴⁹ The contrasting VOC approach to corporate governance was best expressed by Pieter de la Court: 'above all things war, and chiefly by sea, is most prejudicial, and peace beneficial, for Holland'²⁵⁰ For seventeenth-century republicans, the ultimate answer lay with Con-Federalism, 'an extended commercial republic under the rule of law.'²⁵¹

These structural and institutional differences between the two maritime republics, both bearers of a new form of a radical Civic Humanism, largely account for the entrenched inconsistencies and contradictions of Grotius' own treatment

245 The concern of the patrician classes to pre-empt social rebellion may have played a part in this. 'It is otherwise quite understandable that a commonwealth in which the rich province of Holland with its dominant merchant class so much called the tune, would have preferred its army composed of mercenaries, drawn mostly from abroad, rather than of armed citizens.' Boogman, 'The Union of Utrecht', 390. The Venetian 'myth' may also have played a part in comparative absence of militia forces; it was a widespread assumption that the stability of the Venetian republic was due in large part to the prevalence of foreigners within its army, none of whom possessed a vital concern with Venetian politics.

246 Armitage, 'Empire and Liberty', 39–40.

247 Jonathan I. Israel, *The Dutch Republic and the Hispanic World 1606–1661* (Oxford: Clarendon Press, 1982), 134, 200 and 332.

248 Wallerstein, *The Modern World-System II*, 50–1.

249 See below, Chapter Eight.

250 C.H. Wilson, 'Trade, Society and the State', in E.E. Rich and C.H. Wilson (eds), *The Economy of an Expanding Europe in the 16th and 17th Centuries* (vol. iv of *The Cambridge Economic History of Europe*) (Cambridge: Cambridge University Press, 1967), 487–575 at 534.

251 Armitage, 'Empire and Liberty', 46.

of the Aristotelian tradition exhibited in *De Indis*. What we uncover through a close critical reading is an extreme mode of iterability between the antinomies of Civic Humanism and Late Scholasticism, repetitive inversions of hierarchy ultimately threatening the Text with systemic indeterminacy. The latent political and religious tensions of the Dutch Republic are themselves reproduced through the deep internal fissures of *De Indis*. At the heart of the Text's myriad discourses lies the omnipresent problem of Sectarianism.²⁵²

The social divisions within the VOC, the institutional template of *De Indis*, parallel these 'traces' of sectarian and class divisions that structure the text. Through similitude, the VOC stood to the United Provinces as *De Indis* stood to the VOC.²⁵³ Throughout the duration of 'the Grotian Moment', the single most important sectarian division within the Republic was between the latitudinarian (i.e. anti-predestination) Arminians/Remonstrants,²⁵⁴ who included Grotius in their ranks, and the anti-latitudinarian (i.e. pro-predestination) Calvinists/Gomarists. The latter were championed by Prince Maurits of Nassau of the House of Orange the main political rival to Grotius' political patron the Arminian Oldenbarnevelt, and in whose judicial murder Grotius implicated himself following the Orangist coup of 1618.²⁵⁵ Religious divisions precisely paralleled class divisions: Arminianism

252 See Israel, *The Dutch Republic and the Hispanic World 1606–1661*, 421–49.

253 Membership within *Die Heeren XVII* followed a strict logic of regional representation: eight governors from Amsterdam, four from Zeeland, two from the Maas towns (including Grotius' hometown of Delft), two from North Holland, and one rotational member from Zeeland, the Maas, and North Holland. Den Tex, *Oldenbarnevelt*, ii, 306.

254 Both Confessions were named after their respective founders, Jacobus Arminius (1560–1609) and Franciscus Gomarus (1563–1641), both, not un-coincidentally, professors of theology at the university of Leiden, Grotius' alma mater. Hans W. Blom, *Causality and Morality in Politics: The Rise of Naturalism in Dutch Seventeenth-Century Political Thought* (Rotterdam: CIP-Gegevens Koninklijke Bibliotheek, 1995), 42. According to Dutch religious historian G.J. Remier, Arminianism constituted 'a fragment of human freedom and dignity...[the Remonstrants] were the true children of humanism.' C.G. Roelofsen, 'Grotius and the Development of International Relations Theory: "The Long Seventeenth Century" and the Elaboration of a European States System', *Grotiana*, NS 18 (1997), 97–120 at 115–16. Platitudes aside, the crucial point is the intertwined relationship between the competing forms of Dutch Protestantism and Civic Humanism; it is simply impossible to separate political discourse from religious speech. In terms of Deconstruction, 'Theology' and 'Politics' stand in a relationship of perfect iterability, the two seemingly 'distinct' domains forming a discursive unity through the subversion of metaphysical hierarchy.

255 'Grotius lost his nerve at the trial, and provided some damning evidence against his old friend and patron.' Tuck, *Philosophy and Government 1572–1651*, 184. Although originally threatened with death, Grotius was sentenced to life imprisonment after having 'lost his nerve'. Even more remarkable, Grotius was able to 'escape' from Loevenstein Castle on 22 March, 1621 after secreting himself in the wooden crate used to deliver books to and from his cell, which none of his guards bothered to inspect on that momentous day... apparently. Edward Dumbauld, *The Life and Legal*

prevailed among the oligarchic merchant elites, who collectively dominated not only the Estates-General (through their manipulation of the voter registry), but also the Gentlemen XVII, a potent executive board wholly free from majoritarian shareholder concerns, as subject to the terms of incorporation. The Calvinists/Orangists, by contrast, were largely drawn from the middle- to lower-levels of the mercantile class, and were largely excluded from VOC decision-making and profit sharing. It is not misleading to conflate the religious and political disputes of the Republic with the formulation of VOC corporate policy; as Wallerstein has tantalisingly suggested, 'one wonders whether the overall century-long negative balance of the VOC did not mask a gigantic process of internal transfer of income and concentration of capital within the United Provinces, from small investors to big.'²⁵⁶

Orangist/Calvinist opposition to the Oldenbarnevelt regime followed the logic of Dutch hegemonic strategy. Domestically, the Calvinists rejected anti-sectarianism, and favoured a more violent policy of persecution of politically 'suspect' (i.e. pro-Spanish) Catholic minorities, anticipating the collapse of the intrastate settlement. Externally, Prince Maurits urged the transition of Dutch foreign policy away from non-territorialist equilibrium toward Iberian-style self-aggrandisement, seeking a more radical 'incorporation' policy in the Spiceries.²⁵⁷ This latter policy was especially de-stabilising and subverted the carefully constructed balance of power approach of the Arminian Estates-General. The great domestic gain here, apart from greater short-term wealth and the immediate dividends from wars of conquest against Spain, was that the territorialisation of the East Indies would create a tremendous opportunity for capital re-distribution among the hitherto marginalised Calvinist shareholders. There is compelling evidence that it was the Arminian-brokered Truce of 1609 with Spain that served as the decisive factor that triggered the coup d'état against the Oldenbarnevelt government in 1618 and established the political dominance

Writings of Hugo Grotius (Norman: University of Oklahoma Press, 1969), 13. The guards who carried the book-chest down the ladder and to the barge awaiting to depart to Gorcum later testified at the Inquest that they were only able to do so 'with great difficulty'. W.S.M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925), 162. Although further research is required, my personal feeling is that the Orangist authorities deliberately released Grotius to act as a spy and informant on exile republican and dissident groups. The employment of a 'turned' agent is a standard form of anti-insurrectionist practices. Throughout the remainder of his life Grotius untiringly sought to ingratiate himself with the anti-republican regime.

256 Wallerstein, *The Modern World-System II*, 49.

257 Israel, *The Dutch Republic and the Hispanic World, 1606–1661*, 30–33.

However Maurits himself, sincere though his warnings concerning the political and strategic dangers of the proposed truce terms undoubtedly were, did also clearly have a vested interest in continuing the war since, under the prevailing system, both his authority and his emoluments were much greater during war than in peace.

Ibid. 30.

of the dynastic House of Orange.²⁵⁸ The inherently unstable and contradictory logic of the World-System as between the competing approaches of penetration and territorialisation ultimately proved irresolvable, and the self-destructive consequences irrepressible. The collapse of the anti-sectarian compromise also belies the persuasiveness of any overly general correlation between Amsterdam and Venice. Unlike the northern Italian city-states, the issue of Civic Humanism was super-imposed upon a deeper underlying structural cleavage of sectarian rivalry.²⁵⁹ Paradoxically, the adoption of secular Civic Humanism was itself indicative of an antecedent theological choice.

²⁵⁸ Ibid. 1–65. Israel persuasively demonstrates that the considerable economic downturn suffered by the Netherlands during the Twelve Years Truce provides evidence of the centrality of interstate rivalry and colonialist expansion for the Dutch economy. Ibid. 42–65. Ironically, Grotius was personally opposed to the peace talks, yet the publication of *Mare Liberum* appears to have been a means of advancing the negotiations.

His connections with the Delft probably encouraged him in his opposition to peace, for Delft and Amsterdam were the leading centres of the war party, and both were also hosts to chambers of the East India Company, which feared that peace might curtail its activities in the Spanish territories of the East.

Tuck, *Philosophy and Government 1572–1651*, 164. On the *Mare Liberum*, see below, Chapter Seven.

²⁵⁹ Significantly, these ‘local conditions’ were governed primarily by *theological* factors. This is most evident in the specifically Dutch emphasis upon freedom of conscience as a necessary attribute of *libertas*. In stark contrast to the Italians,

at the heart of the conceptions of personal liberty developed during the Dutch Revolt was the idea that freedom of conscience formed the essence of personal liberty... [This] emphasis upon freedom of conscience reflected a fundamental shift in conceptions of liberty. What was at stake in the debates on freedom of conscience was the freedom of individuals to believe, as far as religion was concerned, what they wanted and to speak freely about their beliefs. Such a conception of liberty was alien to the republican conceptions of the Italian Renaissance. It indicates the profound influence of the Reformation on the political thought of the Dutch Revolt.

Van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590*, 281–2. See Eco O.G. Haitsma Mulier, ‘The Language of Seventeenth-Century Republicanism in the United Provinces: Dutch or European?’, in Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), 179–95, *passim*.

V The Dutch War Of National Liberation: *Respublica* and Con-federalism

The Dutch Revolt was a regionally based²⁶⁰ internal war²⁶¹ with aristocratic republican *libertas* secured by a decentralised and cost-efficient military organisation.²⁶² The Grotian corpus naturally reflects both intra- and interstate concerns with both anti-sectarianism and republican ideology.²⁶³ Accordingly, *De Indis* exhibits a recurrent set of expressly juro-political concerns, including the notion of the 'minimalist' State, a 'minimal moral philosophy', and with what Tuck has identified as 'un-theism', the systematic attempt to ground a viable form of international public order in a post-theological 'naturalist' landscape. Accordingly, the *Commentarius in Theses XI*,²⁶⁴ a wide-ranging defence of the 'Dutch Revolt' as a Just War, marks a radical departure from traditional sixteenth-century 'resistance theory', primarily Monarchomachism²⁶⁵ and Constitutionalism.²⁶⁶

The seminal Text of Monarchomachi resistance theory, and one rich in deconstructive potential, is the *Vindiciae contra tyrannos* (1579) by Stephanus Junius Brutus. A thoroughly Calvinist treatise, the *Vindiciae* is premised upon a

260 'The outcome of the revolution—i.e., the confederative constitution of the Dutch Republic—seems to suggest that the provinces were simply incapable of overcoming their traditional regionalism and that provincial autonomy was the most important element in the political creed of the rebels.' J.W. Smit, 'The Netherlands Revolution', in Robert Forster and Jack P. Green (eds), *Preconditions of Revolution in Early Modern Europe* (Baltimore: Johns Hopkins University Press, 1970), 19–54 at 52.

261 The concept of internal war concentrates rather bluntly on the use of violence, and in its obvious link with the conflict model of society it conceives of social order as a precarious balance of power, always challenged but sufficiently resilient, stable, and in control of the situation so as to claim that the use of violence is clearly 'a deviation from previously shared norms'. It follows quite naturally from that in this context Clausewitz's famous definition of war as the continuation of diplomacy by violent means may be applied to internal politics as well: revolution is the continuation of the regular socio-political bargaining process by the use of force.

Ibid. 22. Apart from the issue of 'national liberation', there is little about the Dutch Revolt that could be persuasively categorised as progressive or emancipatory. Ibid. 52–3.

262 Downing, *The Military Revolution and Political Change*, 212–38.

263 'Toleration became the general slogan [of the Revolt] and, in conjunction with the demand for a free Estates-General, became the core of the [republican] political platform.' Smit, 'Netherlands Revolution', 48.

264 See above, Chapter Three.

265 Van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590*, 269–76.

266 Peter Borschberg, 'Critical Introduction', in Hugo Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, ed. Peter Borschberg (New York: Peter Lang, 1994), 15–199 at 169–92.

thoroughgoing covenantalism²⁶⁷ fully consistent with political Corporatism. The Mosaic covenant is re-presented in terms of a compact, or 'contract', which serves to both guarantee and demarcate the corporate sub-division of civil power within the *civitas*.²⁶⁸ What is most intriguing from our perspective, however, is the manner in which the Text effortlessly glides from a descending to an ascending mode of argumentation, tactically co-joining elements of both 'thick' and 'thin' ontology. The *Vindiciae*, following Scripture, posits a theocentric foundation for political *societas*.

First, the Holy Scripture does teach that God reigns by his own proper authority, and kings by derivation, God from Himself, kings from God, that God has a jurisdiction proper, kings are His delegates. It follows, then, that the jurisdiction of God has no limits, that of kings is bounded, that the power of God is infinite, that of kings confined, that the kingdom of God extends itself to all places, that of kings is restrained within the confines of certain countries.²⁶⁹

The descending argument is then co-joined with an ascending one, the investiture of the king by the people, which is identical with the entrance into the original covenant. This serves as the site of a double discourse between Divine Law (*lex divina*) and Civil Law (*ius civile*).

We have shown... that it is God that appoints kings, who chooses them, who gives the kingdom to them: now we say that the people establish kings, put the sceptre into their hands, and who with their suffrage, approve the election God would have it done in this manner... Kings should acknowledge, that after God they hold their power and sovereignty from the people... the election of the king is attributed to God, the establishment to the people.²⁷⁰

As a result of this dual rhetoric, a 'double covenant' is formed, one which is governed simultaneously by Divine and Civil Law.

We have shown already that in the establishment of the king there were two alliances or covenants contracted: the first between God, the king, and the people... The second between the king and the people... In the receiving and inauguration of a prince, there are covenants and contracts passed between him and the people, which are tacit and expressed, natural or civil; to wit, to obey [the king] faithfully while he commands justly, that [the king] serving the commonwealth, all men shall serve him, that while [the king]

267 Stephanus Junius Brutus, 'A Defense of Liberty Against Tyrants' (1579) [*Vindiciae contra tyrannos*], at <http://www.lonang.com/exlibris/misc/1579-vct.htm>, 1-28 at 16-28.

268 Ibid. 16-19.

269 Ibid. 2.

270 Ibid. 7 and 8.

governs according to law, all shall be submitted to his government, etc. He who maliciously or wilfully violates these conditions, is questionless a tyrant by practice.²⁷¹

The double movement of descending/ascending rhetoric allows the Text to introduce the full panoply of legal ontology—Civil, Natural, and Divine—as a way of regulating the constitutional foundations of the *civitas* and to determine, with a high degree of precision, the contours of the civil power. Accordingly, the *Vindiciae* assigns equal weight to the preconditions for lawful resistance to the tyrant's violation of *both* Divine and Civil Law.

But if a prince purposely ruin the commonwealth, if he presumptuously pervert and resist legal proceedings or lawful rights, if he make no reckoning of faith, covenants, justice nor piety, if he prosecute his subjects as enemies... then we may certainly declare him a tyrant, who is as much an enemy both to God and men.²⁷²

In a manner that should be wholly familiar by now, Brutus employs Conciliarism as a means of discursively framing the tyrant's corporatist violation of *lex divina*.

For as the councils of Basle and Constance have decreed (and well decreed) that the universal council is an authority above the bishop of Rome, so in like manner, the whole chapter may overrule the bishop, the University the rector, the court the president. Briefly, he, whosoever he is, who has received authority from a company, is inferior to that whole company, although he be superior to any of the particular members of it.²⁷³

To bolster this argument from Corporatism, Brutus makes an overt appeal to two primary Scholastic authorities, Bartolus and Aquinas. For Bartolus, the tyrant 'may either be deposed by those who are lords in sovereignty over him, or else justly punished according to the law Julia [codified law] which condemns those who offer violence to the public.'²⁷⁴ For Aquinas, 'tyrannical rule, having no proper address for the public welfare, but only to satisfy a private will, with increase of particular profit to the ruler, cannot in any reasonable construction be accounted lawful, and therefore the disturbance of such a government cannot be esteemed seditious, much less traitorous.'²⁷⁵

Although a foundational Monarchomachi text, the *Vindiciae*, in its descending Corporatism, is a remarkable example of the Scholastic concept of *libertas*.²⁷⁶ Orthodox theories of resistance, or lawful rebellion, flowing from the Monarchomachi tradition, were premised on two cardinal notions,

271 Ibid. 16 and 27.

272 Ibid. 23.

273 Ibid. 6.

274 Ibid. 24.

275 Ibid. 25.

276 See above, Chapter Three.

'Natural Liberty' and the figure of the 'Inferior Magistrate.' Under the first, 'the People' (*publicae*) are the true bearers of that legal identity and personality which historically pre-dates any particular social formation; consequently, any subsequent act of lawful political incorporation—the covenant—rests upon the voluntary transfer of inalienable rights from the People to the Polity. Under the second, the People possess an inalienable right to exercise lawful armed force against an otherwise legitimate public authority that has violated the conditions of the earlier act of covenant through acts of tyranny. Broadly, but not exclusively, associated with the politically more moderate Protestantism of the Huguenots,²⁷⁷ the concept of the 'Inferior Magistrate' was subjected to a more subversive doctrinal alteration by the more radically egalitarian Calvinists,²⁷⁸ who expressly inferred an inalienable right to take up arms on the basis of 'Natural Liberty' alone.

For its part, the *Vindiciae* clearly restricts the right of lawful resistance to natural liberty alone, effectively delegating the political authority to resist to the magistrates who themselves have received a prior conveyance of the right to resist from the people.

When we speak of all the peoples we understand by that, only those who hold their authority from the people, to wit, the magistrates, who are inferior to the king, and whom the people have substituted, or established, as it were, consorts in the empire, and with a kind of tribunitia authority, to restrain the encroachments of sovereignty, and to represent the whole body of the people... To be short, as it is lawful for a whole people to resist and oppose tyranny, so, likewise the principal persons of the kingdom may as heads and for the good of the whole body, confederate and associate themselves together; and as in a public state, that which is done by the greatest part is esteemed and taken as the act of all, so in like manner must it be said to be done, which the better part of the most principal have acted, briefly, that all the people had their hand in it.²⁷⁹

277 Skinner credits the French Protestants with developing the basic foundation of 'modern' political discourse. The Huguenots

were able to make the epoch-making move from a purely religious theory of resistance, depending on the idea of a covenant to uphold the laws of God, to a genuinely political theory of revolution, based on the idea of a contract which gives rise to a moral right (and not merely a religious duty) to resist any ruler who fails in his corresponding obligation to pursue the welfare of the people in all his public acts.

Quentin Skinner, *The Foundations of Modern Political Thought. Volume Two: the Reformation* (Cambridge: Cambridge University Press, 1978), 335. Van Gelderen points out, however, that Dutch theorists developed the same discourse, but invested it with a more overtly republican content. Van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590*, 275–6.

278 Robert M. Kingdon, 'Calvinism and Resistance Theory, 1550–1580', in J.H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (Cambridge: Cambridge University Press, 2001), 193–218, *passim*.

279 Brutus, *Vindiciae contra tyrannos*, 6 and 7.

In the *Politica*, Althusius, who operated within the moderate tradition of the German Monarchomachi,²⁸⁰ formulated a similar notion of the delegated ‘inferior magistrate’, the ‘Ephors’, who are responsible for keeping the civil power of the executive, or the ‘supreme magistrate’,²⁸¹ in check during periods of political crisis. Like Brutus, Althusius follows a descending line of argument, predicating the Ephors upon *lex divina*.

God has formed in all peoples by the natural law itself the free power of constituting princes, kings, and magistrates for themselves. This means that in the measure in which any commonwealth that is divinely instructed by the light of nature has civil power, it can transfer this power to another or others who, under the titles of kings, princes, consuls, or other magistrates, assume the direction of its common life.²⁸²

Closely following the *Vindiciae*, the *Politica* simultaneously affirms both a descending and an ascending argumentation, the two rhetorics converging at the site of the national level of delegated authority.

Ephors are the representatives of the commonwealth or universal association to whom, by the consent of the people associated in a political body, the supreme responsibility has been entrusted for employing its power and right in constituting the supreme magistrate and in assisting him with aid and counsel in the activities of the associated body. They also employ its power and right in restraining and impeding his freedom in undertakings that are wicked and ruinous to the commonwealth, in containing him within the limits of his office, and finally in fully providing and caring for the commonwealth that it not suffer anything detrimental by the supreme magistrate’s private attachments, hatreds, deeds, negligence, or inactivity... For this purpose the ephors have the power of helping the general and supreme magistrate by counsel and aid, and of admonishing and correcting him when he violates the Decalogue of divine law, or the sovereign rights and laws of the realm. Therefore, they have received the right of the sword (*ius gladii*) for the sake of discharging the required responsibility.²⁸³

We should not be terribly surprised, therefore, that Althusius holds up the United Provinces as an outstanding example of the ephors at work; for ‘the universal association entrusted to its ephors the care and defence of these rights against all violators, disturbers, and plunderers, even against the supreme magistrate himself. The Dutch Wars of Independence offer examples of this care and defence by ephors during forty years of exploits against the King of Spain.’²⁸⁴ What ultimately restrains both Althusius and Brutus in their republican enthusiasm is, of course,

280 Van Gelderen, ‘Aristotelians, Monarchomachs and Republicans’, 205–6.

281 Althusius, *The Politics of Johannes Althusius*, 115–29.

282 Ibid. 91.

283 Ibid. 94 and 99.

284 Ibid. 101.

the conveyance theory of lawful resistance; opposition to tyranny must never be allowed to degenerate, in Polybian terms, into democratic revolution, but must always be constrained by the correct constitutional mechanisms. All resistance to the tyrant, in order to be lawful, must be both a public and a collective act, consistent with the original covenant. As Brutus makes clear, 'particular and private persons may not unsheathe the sword against tyrants by practice, because [tyrants] were not established by particulars, but by the whole of the people.'²⁸⁵ It is for that reason, then, all the more remarkable that we find in *De Republica emendanda* the usually oligarchic Grotius advocating a radically Calvinist notion of private resistance grounded directly upon Divine Law.

Among the Hebrews... between the days of Joshua and Samuel... the common form of government was dissolved, and each tribe adopted a policy of its own and waged wars of their own, *except when God dispatched a special avenger* thus forcing them back into a temporary unity [*nisi siquando Deus misso extra ordinem vindice omnes ad tempus velut in unum cogeret*].²⁸⁶

The importance of this 'special' or 'private' avenger for the 'thick' ontology of *De Indis* will be discussed at greater length in Chapter Seven. For now, it is sufficient to draw attention to the manner in which Grotius, even in his most 'Humanist' Texts, cannot avoid oscillating between contending variants of *ius naturale*. This is readily apparent even within the most 'un-theistic' works. Committed to a Venetian-style oligarchy,²⁸⁷ the *Commentarius*²⁸⁸ rejects radical Resistance Theory,²⁸⁹ postulating instead a *via media* derived from that multi-purpose free-floating Grotian signifier, Divisible Sovereignty, here re-formulated as '*residual sovereignty*', one that is inherent within the secular political order but capable of indefinite sub-division consistent with *ius naturale*. Art. 16 provides a generic definition of sovereignty: 'That supreme right to govern the state which recognizes no supreme authority among humans, such that no person(s) may, through any right [*ius*] of his own, rescind what has been enacted thereby'.²⁹⁰ The Text then moves to a more detailed empirical consideration of *actus summae potestatis*, those necessary 'marks' or *signs* of sovereignty; intriguingly, 'right' is clearly associated with 'power'.

Those that no one may rescind by virtue of any higher right, for example, the supreme right to introduce legislation and to withdraw it, the right to pass judgement and to

²⁸⁵ Brutus, *Vindicae contra tyrannos*, 28.

²⁸⁶ Grotius, *De Republica emendanda*, 115. Emphasis added.

²⁸⁷ Tuck, *Philosophy and Government 1572–1651*, 159.

²⁸⁸ Grotius, *Commentarius in Theses XI*, 229.

²⁸⁹ See *ibid.* 'Praefatorio', 206–13 for Grotius' anti-Monarchomachism.

²⁹⁰ *Ibid.* 215.

grant pardon, the right to appoint magistrates and to relieve them of their office, the right to impose taxes on the people, etc.²⁹¹

Accordingly

If some marks [*acti*] rest with the prince, and others with the senate, or rather with the prince and the senate, one cannot claim that full sovereignty is either with the prince or with the senate, but [only] with the prince and the senate [together]. The prince and the senate, however, are not one but several.²⁹²

The *Commentarius* then provides a 'primitive' theory of constitutional checks and balances, which is inseparable from a residual sovereignty that is identified with *libertas*; 'There are many benefits arising from dividing the marks of sovereignty and for this reason it is held to be prudent to keep some separate. Not least of these is that it seems to be the most convenient way of preventing tyranny.'²⁹³ In other words, there is a *conditional* right of resistance, dependent in turn upon issues of historical evidence and political identity. The *Commentarius* asserts²⁹⁴ that there is persuasive historical evidence of a continuing presence of residual sovereignty within the Dutch 'People' (i.e. the 'Batavians'),²⁹⁵ institutionally expressed through the *Ordines*.²⁹⁶ As the Dutch Estates never expressly conveyed to 'the prince' (i.e. Spain) the power to tax, *libertas* can be legally classified as a 'legitimate spoil' of *bellum iustum*, a lawful armed struggle between rival public authorities waged in pursuit of the enforcement of *ius*.

291 Ibid. 225.

292 Ibid. 229.

293 Ibid. 249.

294 Ibid. 219 and 281–83.

295 Here, Grotius reveals his Civic Humanist background in expressly relying upon Tacitus. Tuck, *The Rights of War and Peace*, 11. See Schama, *The Embarrassment of Riches*, 69–81; I. Schoeffer, 'The Batavian Myth During the Sixteenth and Early Seventeenth Centuries', in J.S. Bromley and E.H. Kossman (eds), *Some Political Mythologies* (vol. v of *Britain and the Netherlands*) (The Hague: Martinus Nijhoff, 1975), 78–101, *passim*. Grotius' reliance upon the ancient Batavian tribe as a signifier of Dutch national independence is revealing, as a preoccupation with the historical continuity of *libertas* is a vital sign of a Venetian and, therefore, patrician political consciousness. 'The most important point in the Venetian's version of the historical development of their city was that it had been free from its origin. Not only had the 'founding fathers' been beholden to no one, but Venice had also preserved its liberty inviolate in subsequent years.' Haitsma Mulier, *The Myth of Venice and Dutch Republican Thought in the Seventeenth Century*, 13; also *ibid.* 6–13. See below, Chapter Six.

296 For Grotius, every society, 'including States, is regarded as deriving its existence, in the last resort, from the Individual; and [no society] rises above the level of a system of relations established by agreement between the owners of individual rights.' Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, 78.

Thanks to the iterability of Divisible Sovereignty, 'Batavian private persons' (i.e. the Dutch), in both their particular and universal aspects, are co-sovereigns with the Spanish Crown, and constitute their own form of legitimate—and *self-legitimising*—public authority, the greatest of all republican conceits.

The war against Philip was at its inception a just war both in respect of its cause and with regard to [the Batavian's] defence of their marks of sovereignty... We have demonstrated briefly that it was legitimate for the States of Holland to convene against Philip; that the war was both just and public that was undertaken by them either unanimously or on the basis of majority decision; and that all the marks of sovereignty that once rested with Philip were [subsequently] acquired by the States [of Holland].²⁹⁷

Divisible Sovereignty and *bellum iustum* receive even more radically republican expression in *De Indis*; the *Historica* serves as a crucial textual/discursive linkage between the Just War waged by the VOC and the republican precepts of the lawful war of national liberation; 'The power that has been bestowed upon a prince can be revoked, particularly when the prince exceeds the bounds defining his office, since in such circumstances he ceases *ipso facto* to be regarded as a prince.'²⁹⁸ Herein, residual sovereignty and Republicanism are neatly fused with the anti-Universalism of nascent Dutch hegemony: 'Since the State has no superior, it is necessarily the judge even of its own cause. Thus the assertion made by Tacitus... was true, namely that by a provision emanating from the Divine Will, the people were to brook no other judge than themselves.'²⁹⁹

It is tempting to discern a (sub-) textual Derridean 'pun' that operationally co-joins the dyadic texts. For Derrida, 'puns' are irruptions into the text that produce in the reader an awareness, hitherto repressed, of the role played by signifiers within language and, from this, of the extreme contingency of all linguistic relationships.³⁰⁰ The iterability, or radical reversibility, of the 'mark' of sovereignty as *itself* constitutive of Sovereignty, unintentionally belies the wholly constructivist—and, therefore, contingent—nature of the alleged 'Sovereign'. *De Indis* treats the 'mark' in a manner that is remarkably proto-Structuralist. The *actus* is inherently ambiguous, not identical with either *potestatis* or *ius*, but an operationally 'free-floating signifier' of the lurking 'presence' of Sovereignty;³⁰¹ 'the term *actus* suggests not a diagnostic criterion which serves to indicate who

297 Grotius, *Commentarius in Theses XI*, 283.

298 Grotius, *De Indis*, 289. For the historical discussion of the Dutch grievances against Philip II, see *ibid.* 168–71. 'This was the beginning of the movement in which oaths were taken in support of the sovereignty of the States-General as against Philip' *Ibid.* 170.

299 *Ibid.* 24–25.

300 Jonathan Culler, *On Deconstruction: the Theory and Criticism of Structuralism* (London: Routledge & Kegan Paul, 1983), 91–2. Again, the linkage between Deconstruction and Psychoanalysis proves crucial. See above, Chapter Two.

301 Borschberg, 'Critical Introduction', 55.

possesses sovereign power, but the active exercise of some part of that power; the rendering *function* might be equally important.³⁰² The radically contextual nature of the *acti*, reminiscent of *langue/parole* itself, highlights the extreme iterability that governs the Grotian alterity between ‘public’ and ‘private’ actors. Within this discursive frame, both States and Persons—which include Corporations³⁰³—are both fully able to respectively exercise the ‘sovereignty function’ and, thereby, acquire the signature ‘mark’.

For Tuck, *De Indis* constitutes a seminal (‘essentialising’?) moment in the Grotian Heritage.

Grotius... made the claim that an individual in nature (that is, before transferring any rights to a civil society³⁰⁴) was morally identical to a state, and that there were no powers possessed by a state which an individual could not possess in nature. The kind of state he had in mind, moreover, was one which was sovereign in a strong sense... *supra republicam nihil est*.³⁰⁵

‘Strong’, that is, against other States, but ‘weak’ against private/natural persons. Employing his trademark duality, Grotius postulates a logically necessary correlation (re. iterability) between the operation of the conveyance model intrastate (person/private → state/public) and interstate (Holland → Spain). There is no metaphysical hierarchy infusing ‘public authority’; such superiority is a wholly conditional Presence, contingent upon a clear and unconditional transference of right/title.³⁰⁶ Naturally, there is a concomitant duality at work governing the relationship among the various state/provincial members of the United Provinces itself, mirroring the incorporated structure of the VOC; ‘The outcome of the revolt against Spain was a Republic with a complex mixture of several layers of government.’³⁰⁷ Completely consistent with republican Corporatism, the Dutch Republic consisted of an ascending series of political associations, from city³⁰⁸ to provincial Estate to ‘national’ Estates-General. The pluralisation of juro-political identity, coupled with the decentralisation of political authority, proved to be the keystone of the entire series of political associations.

302 Philip H. Burton, ‘Foreword to the English Edition’, in Grotius, *Commentarius in Theses XI*, 205.

303 Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, 70–8. See above, Chapter Four.

304 The Batavians.

305 Tuck, *The Rights of War and Peace*, 82. For Grotius, a remarkably ‘positivist’ sentiment.

306 ‘It was upon this basis that he defended in the *De Indis* the Dutch Revolt against the King of Spain saying that the States of Holland represented the people of Holland and that the magistrate (the King) was always under their authority.’ Ibid.

307 Hart, ‘The Dutch Republic’, 57.

308 Moerke, ‘The Political Culture of Germany and the Dutch Republic’, 156–62.

Following the multitude of autonomous polities, the social fabric of the elite was highly diffuse. The provinces rose to the status of sovereignty, and within their boundaries cities and rural boards exerted a strong autonomy, in most cases even stronger in comparison with the period of Habsburg rule. Almost all towns with a formal charter gained a constitutional position in their respective provincial estates. There were fifty-seven constitutional towns in all. Inter-city frictions, inter-regional strifes and inter-provincial rivalries guided the coalitions, bargaining, and resolutions of the provincial governments and the States General. But an advantage was the broad support received by the new state from almost all major elite groupings, as their local powers were enhanced.³⁰⁹

The Treaty of Utrecht (1579) served as the contractual basis for the ‘incorporation’ of the Batavian states into the United Provinces;³¹⁰ significantly, the text of the treaty employs the quite different constitutional terms *Landen* (juro-political) and *Provincien* (geo-spatial) interchangeably. *De Indis* refers to the United Provinces as *respublica*, subject to the conveyance model, but the *Commentarius* denotes the United Provinces *natio*, subject to the residual sovereignty model; here, Batavia always denotes the *Provincien* of Holland, Grotius’ native ‘state’ or *Landen*.

The political and constitutional framework that developed ‘naturally’ in the Netherlands—even if only by default³¹¹—closely approximates the corporatist model formulated by Althusius; as I have already indicated there is no doubt that the German Monarchomach used the United Provinces as one of the models for his corporatist theory of symbiotic association.³¹² This is a point of some importance concerning the problem of the exclusively Humanist nature

309 Hart, ‘The Dutch Republic,’ 66. Constitutional arrangements mirrored economic necessities perfectly.

Economically, the agricultural specialisation and occupational differentiation [of the Dutch countryside]... took place via multiple initiatives, many of them rural in origin. Cities did not dominate and orchestrate this process. Without sharp social tension between city and countryside, a commercial system took shape that flowed almost seamlessly from city to country, from town to village. Politically, government, especially in Holland, was institutionalised at the provincial level in such a way as to check the unmediated rule of a city while it established a forum in which all economic interests could be integrated in the formulation of government policy.

Jan De Vries, ‘The Transition to Capitalism in a Land without Feudalism,’ in Peter Hoppenbrouwers and Jan Luiten van Zanden (eds), *Peasants into Farmers? The Transformation of Rural Economy and Society in the Low Countries (Middle Ages-19th Century) in Light of the Brenner Debate* (Turnhout: Borepols Publishers, 2001), 67-84 at 81.

310 Boogman, ‘The Union of Utrecht,’ *passim*.

311 ‘By 1588... the Dutch Republic had come into being, not by achieved intention but by the failure of alternatives.’ Rowen, *The Rhyme and Reason of Politics in Early Modern Europe*, 55.

312 See above, Chapter Three.

of republican discourse. As with the Calvinist *Vindiciae*, the *Politica* employs an iterable descending/ascending argumentation. At first glance, the Calvinist-Humanist Text would appear to rely exclusively upon an ascending rhetoric.

For human society develops from private to public association by the definite steps and progressions of small societies. The public association exists when many private associations are linked together for the purpose of establishing an inclusive political order (*politeuma*). It can be called a community (*universitas*), an associated body, or the pre-eminent political association.³¹³

Within the Althusian schema, the ascending concentric rings of political association are the family,³¹⁴ the collegium,³¹⁵ the city,³¹⁶ the province,³¹⁷ and the commonwealth, or *respublica*.³¹⁸ The underlying theme of the *Politica* linking these various forms of association is the ascending migration from the private to the public form of political society.

The members of a community are private and diverse associations of families and collegia, not the individual members of private associations. These persons, by their coming together, now become not spouses, kinsmen, and colleagues, but citizens of the same community. Thus passing from the private symbiotic relationship, they unite in the one body of a community.³¹⁹

The final, or highest, form of political association is the ‘universal association’ of the commonwealth, the location of the political and legal identity of the State. It is at the level of the commonwealth that the issue of political sovereignty emerges for the first time.

Such are the members of the realm. Its right is the means by which the members, in order to establish good order and the supplying of provisions throughout the territory of the realm, are associated and bound to each other as one people in one body and under one head. This right of the realm (*ius regni*) is also called the right of sovereignty (*ius majestatis*). It is, in other words, the right of the major state or power as contrasted with the right that is attributed to a city or a province.³²⁰

313 Althusius, *The Politics of Johannes Althusius*, 34.

314 Ibid. 22–7.

315 Ibid. 28–33.

316 Ibid. 34–45.

317 Ibid. 46–60.

318 Ibid. 61–73.

319 Ibid. 35.

320 Ibid. 64.

Althusian Corporatism naturally equates with Republicanism; ‘This right of the realm, or right of sovereignty, does not belong to individual members, but to all members joined together and to the entire associated body of the realm.’³²¹ Yet, precisely because it is the sovereignty of *respublica* itself that is an issue of concern, the *Politica* rather suddenly shifts towards a descending mode of argumentation. Sharply distinguishing himself from Bodin, Althusius declares that the *ius majestatis* exercised by *respublica* cannot be of an Absolutist nature commensurate with the investiture of the heterogenous *universitatis* by Presence; the sovereignty of the commonwealth ‘is not supreme because all human power acknowledges divine and natural law (*lex divina et naturalis*) as superior.’³²² In an overtly Scholastic manoeuvre,³²³ Althusius declares

For there is no civil law, nor can there be any, in which something of natural and divine immutable equity has not been mixed. If it departs entirely from the judgement of natural and divine law (*ius naturale et divinum*), it is not to be called law (*lex*). It is entirely unworthy of this name, and can obligate no one against natural and divine equity.³²⁴

The heterogeneity of political identity, manifested through the diverse forms of political association, is both the sign and the signifier of Divine Presence, legitimating a ‘double movement’ on the part of the *Politica* ‘backwards’ to an alternate form of descending rhetoric. Sovereignty, or the supreme power, is to be

attributed rightfully only to the body of a universal association, namely, to a commonwealth or realm, and as belonging to it. From this body, after God, every legitimate power flows to those we call kings or optimates. Therefore, the king, prince, and optimates recognise this associated body as their superior, by which they are constituted, removed, exiled, and deprived of authority... For however great is the power that is conceded to another, it is always less than the power of the one who makes the concession, and in it the pre-eminence and superiority of the conceder is understood to be reserved.³²⁵

The rhetorical key to this shift from ascending toward descending is the ‘lurking presence’ of the ‘thick’ ontological discourse of the *Politica*, the grounding of the universal symbiotic communication upon *lex divina*. It is this universal communion that serves as the meta-normative principle that legitimates the ascending order of political association culminating in *respublica*.

321 Ibid. 65.

322 Ibid. 66.

323 Blom, in fact, de-notes Althusius a ‘neo-scholastic’ Blom, ‘“Our Prince is King!”’, 53.

324 Althusius, *The Politics of Johannes Althusius*, 67.

325 Ibid. 68.

We attribute [to the commonwealth] by right of sovereignty to the associated political body, which claims it for itself alone. In our judgement, it is derived from the purpose and scope of the universal association, namely, from the utility and necessity of human social life. According to this position, therefore, the nature and character of the imperium [jurisdiction] and power will be that they regard and care for the genuine utility and advantages of subjects.³²⁶

The 'secular' *societas*, therefore, in orthodox Scholastic fashion, mimetically replicates the descending hierarchy of ontological Being.

Each part of this right of the realm... consists of universal symbiotic communion and of its administration... Universal symbiotic communion is the process by which the members of the realm or universal association communicate everything necessary and useful to it, and remove and do away with everything to the contrary. And therefore the right of the realm pertaining to symbiosis and communion can be described as living lawfully, as nourishing life, and as sharing something in common.³²⁷

Lurking within the *Politica*, no less than within *De Indis*, is a Derridean 'pun'; Althusius employs ecclesiastical 'communion' and secular 'communication' interchangeably.³²⁸ As if to underscore this point of ontological iterability, the *Politica* states that

universal symbiotic communion is both ecclesiastical and secular. Corresponding to the former are religion and piety which pertain to the welfare and eternal life of the soul, the entire first table of the Decalogue. Corresponding to the latter is justice, which concerns the use of the body and of this life, and the rendering to each his due, the second table of the Decalogue. In the former, everything is to be referred immediately to the glory of God; in the latter, to the utility and welfare of the people associated in one body. These are the two foundations of every good association. Whenever a turning away from them has begun, the happiness of a realm or universal association is diminished.³²⁹

Although re-presented as co-eval, the *ius civile* of the second table of the Decalogue is, in fact, derivative from the *lex divina* of the first table; it is Presence, inhabiting the first part of the Decalogue, that invests universal symbiotic communion/communication with ontological Being.

Secular and political communion in the universal realm is the process by which the necessary and covenant means for carrying on a common life of justice together are communicated among the members of the realm. This communion is the practice of

³²⁶ Ibid.

³²⁷ Ibid. 69.

³²⁸ Ibid. 70 fn. 1. Frederick S. Carney translator.

³²⁹ Ibid. 70.

those things that relate to the use of this life or the public affairs of the realm. Whence arises the secular right of the sovereignty (*ius majestatis*), and the employment of a king. This secular right of the realm (*ius regni*) or right of sovereignty, guides the life of justice organised in universal symbiosis according to the second table of the Decalogue. This right trains us how to live justly in the present world, as the Apostle [Paul] says, and so involves the practice of the second table of the Decalogue.³³⁰

It is the Presence of Divine Being that guarantees that the Positive Law of the *ius civile* is always 'read down' from both *lex divina* and *ius naturale*.

Special and secular right of sovereignty indicates and prescribes the particular means for meeting the needs and wants of all symbiotes of this association, for promoting advantages for them, and for avoiding disadvantages. For as each member of the body was created and constituted for its duty, and yet each and every member has the same end, namely, the conservation of the whole body, so each of us has been ordained to his proper and individual role in life, but nevertheless all of us to the glory of God and the welfare of our neighbour. This special right should be equitable, good, useful and adapted to place, time, and persons. Whence it is called civil law (*ius civile*), and is said to be peculiar to each polity.³³¹

The practical constitutional problem that arises for the 'United' Provinces, then, is one of federalism versus con-federalism. Although not working within the Monarchomachi tradition, and, apparently, not under the direct influence of Althusius, the 'thick' ontological features of Corporatism allow Grotius to iterably situate *ius majestatis* within both Holland and the United Provinces, conditional upon the immediate tactical and rhetorical requirements of the Text. Grotius' crucial discursive manoeuvre here is to re-present *both* Holland and the United Provinces as con-federated universal associations; both 'realms', as incorporated amalgamations of various ascending political associations, meet the objective criterion of Sovereignty, and are, as a result, fully governed by Civil, Natural, and Divine Law. Accordingly, heterogenous Corporatism, signifying both Divisible Sovereignty and the de-centralisation of public authority, logically commits Grotius to a thoroughgoing con-federalism; the Dutch confederacy 'was an alliance in which no participatory country had shared any part of its sovereignty'.³³² Conversely, just as the 'United Provinces' constitutes a political association flowing from the ascending conveyance of private rights, so is the VOC a public con-federalist incorporation of smaller provincial-based trading companies forming its new executive within the world-city Amsterdam.³³³ In this regard, scholars who

330 Ibid. 74.

331 Ibid. 79.

332 Ibid. 83.

333 Each provincial chamber, or *kamen*, of the Company

enjoyed real autonomy; it fitted out its own ships, chose the men both for the ships and for the Indies, and gave them their instructions separately; it selected the merchan-

emphasise the historically 'derivative' nature of the VOC on grounds of the preceding political act of incorporation by the Estates-General tend to under-appreciate the subversive challenge of *De Indis*. Applying Grotius' reasoning strictly, the statutory incorporation of the Company by the State can be easily interpreted as the mere de facto legitimation of one particular institutional expression of pre-existent inalienable right. The impetus behind most historical commentary on this point has been to render the genesis of the Company consistent with the dominant understanding of 'Mercantilism' as a state-centric phenomenon.³³⁴ The theoretical difficulty with orthodox Statist assumptions (e.g. 'the British School') is precisely that the alleged 'Father of International Law' is a dogmatic partisan of the Corporate Sovereignty model of Legal Personality. The strictly logical extension of Grotian 'theory' (*reductio ad absurdum*?) is, in fact, the potentially infinite sub-divisibility of Original Personality.

Accordingly, as a sign of inalienable con-federalist sovereignty, Holland itself is invested with full war- and treaty-making powers³³⁵ as evidenced by the lawful seizure of the *Santa Catarina*, the 'seminal act' creating both the VOC and its textual counterpart, *De Indis*.

We have declared that the primary and supreme power to make war resides within the state and *that any perfect community is... a true state...* [this] as Victoria observes³³⁶... The domain of Holland in itself constitutes a whole state. Moreover, just as he who speaks of troops and cohorts is speaking of an army, so he [who] refers to the internal states wishes to be understood as referring to nothing more nor less than the said community, since all parts of an entity, when taken together, are exactly equivalent in point

dise which it sent to the Indies and it sold returns on its separate accounts, setting on one side certain commodities which were only to be traded by agents of the Company acting for the Company as a whole. Each chamber could raise loans on its separate account and it was even possible for the financial situation of one chamber to be quite different from that of the others. The chambers only made liaisons among themselves very slowly, and the unity and survival of the Company were normally assured by the intervention from the most active chamber, that of Amsterdam, which presided for six years out of eight.

E.J.L. Coornaert, 'European Economic Institutions and the New World: the Chartered Companies', in E.E. Rich and C.H. Wilson (eds), *The Economy of an Expanding Europe in the 16th and 17th Centuries* (vol. v of *The Cambridge Economic History of Europe*) (Cambridge: Cambridge University Press, 1967), 223-74 at 255. In this way, the Amsterdam chamber replicated within the VOC the general position of Holland towards the other *Provincien* of the United Provinces. On the parallels between the VOC charter and the republican constitution of the United Provinces, see above, Chapter Four.

334 See below, Chapter Seven.

335 Grotius, *De Indis*, 284-91.

336 Francisco de Vitoria, 'On the Law of War', in id. *Francisco de Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 293-327 at 307.

to the whole... *Both by natural law and by divine law (according to the thoroughly sound conclusion which we borrow from...Victoria³³⁷), all civil power resides in the state, which is by its very nature competent to govern itself, administer its own affairs and order all faculties to the common good³³⁸...* In the light of these arguments, it is clear that the state of Holland, even if it was subject to a prince, did not lack authority to undertake a public war independently of that ruler; for otherwise the said state would not have been self-sufficient.³³⁹

The significance of the Author's reliance upon Late Scholastic authority to legitimate lawful warfare and the convergence of the republican Text with the Scholastic notion of *libertas* will be discussed at greater length in Chapter Six. More important for the moment is to note that as the result of such a discursive conflation Grotius manages to subvert any cognisable demarcation between intra- and interstate domains as either International Personalities or as theatres for the direct application of 'International' Law; both the intra-state and the interstate may serve as the locus of Sovereignty. By transposing this fragmentary—and fragmenting—binary system to the Modern World-System, Grotius formulates within the text of *De Indis*, for the very first time in his career, something that reasonably approximates a 'coherent' theory of International Law.

Furthermore, even if those entities which we call 'internal states' were not equivalent to the state itself, but had instead the character of magistracies established by the latter and inferior in rank to the prince, the conflict in question would still be a public war.³⁴⁰ For we have maintained in agreement with Victoria and with other authorities, that in cases where the prince is inactive, inferior magistrates are empowered not only to repel injuries but also to initiate a public war for the purposes of punishing foreign malefactors... *For... the people have retained the power conferred upon them by natural law, and may avail themselves thereof on occasions when the king himself is not making use of his own power...* Therefore, the States Assembly of Holland [*Ordines republicae Hollandisae*] had a right to declare war.³⁴¹

337 Francisco de Vitoria, 'On Civil Power', in id. *Francisco de Vitoria: Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 1–44 at 7.

338 All signs of republicanism; see Onuf, *The Republican Legacy in International Thought*, 58–84.

339 Grotius, *De Indis*, 283–5.

340 Here, 'Public' equals 'Just' as with Gentili.

341 Ibid. 283–5. Emphases added. Tuck has usefully noted that the Carnegie Foundation translation of *De Indis* frequently confuses the Estates-General of the United Provinces with the 'internal' or 'national' assembly/*Landes* of Holland, thereby subverting Grotius' robustly con-federal model. Tuck, *The Rights of War and Peace*, 84 fn. 15.

The World-System basis for this 'Grotian Theory' is the hegemonic status of Holland/United Provinces and the pragmatic requirements of balance of power interstate relations, discursively grounded upon the juridical legitimation of the seizure of the *Santa Catarina*. The World-Economy served as the recipient template of Grotius' outward projection of Dutch intrastate constitutional governance, the hyper-privatisation theory of public and private authority exported universally, with all trans-national behaviour to be governed in accordance with the precepts of a 'minimal moral philosophy'. In this way, the affirmation of Dutch Corporate Sovereignty and the abnegation of Iberian/Papal Universal Monarchy become textually identical acts.

VI *Respublica* and Minimal Moral Life

It is a well-established 'fact' within the history of political philosophy that 'self-interest' is a sign of republican discourse. As people are motivated by self-interest they are, ultimately, governed by subjective *passion*, not objective reason. As we have already seen, it is precisely here that both Aristotle and Polybius ultimately situate the 'natural law' governing the cycles of political revolution, culminating in the radical alterity of tyranny. The 'problem' that republican theory has to solve is how to formulate the 'correct' set of constitutional and institutional arrangements that work to either: (i) subordinate the passions to reason, or; (ii) practically reconcile the passions with reason (this is conventionally known as 'enlightened self-interest'). For Scott, this recurrent problem underpins the great similitude between seventeenth-century Dutch and English republican thought; Algernon Sidney, James Harrington, Pieter de la Court, Spinoza, and the brothers De Witt are all clearly working within an overlapping set of discursive frameworks, albeit arriving at very different outcomes.³⁴² It is for this reason that I find extremely persuasive—and helpful—Scott's admonition that the 'true' nature of Republicanism cannot be exhausted by formal constitutional arrangements. At least as important is the normative ethos of Republicanism as a discourse; for Scott, 'the substance (as opposed to the form) of classical republicanism lay in certain moral and political assumptions and practices.'³⁴³ My concern, however, is with the Grotian 'event' of the very early 17th century, the period of Grotius' clearly 'republican phase', which is co-joined with the nascent hegemony of the United Provinces. Therefore, my discussion will focus on Grotius' more restricted role in formulating a rudimentary republican theory consistent with and directly, even pragmatically, applicable to both the VOC and the Dutch Republic as parallel corporate embodiments of *ius naturale*. Within these terms, it can readily be seen that within Grotian discourse the minimal moral life of the private person serves as an analogue for the minimalist nature of international civil society,³⁴⁴

342 Scott, 'Classical Republicanism in Seventeenth-century England and the Netherlands', 67–81.

343 Ibid. 65.

344 Onuf, *The Republican Legacy in International Thought*, 49–53.

governed by the now familiar transposition from intra- to interstate levels/units of analysis.³⁴⁵ Even by seventeenth-century mercantile standards, Jan Company enjoyed a reputation of unsurpassed ruthlessness; the Company's systemic disregard of confessionalism, ethnicity, political affiliation, coupled with a steadfast refusal to evangelise for fear of disrupting capital flows,³⁴⁶ rendered the VOC an almost idealised stereotype of the minimal moral agent. In this regard, the VOC was supremely well adapted to the reductionist mercantile culture of the Indian Ocean world system, governed by the purest form of economic rationality imaginable.³⁴⁷

Critical here is Grotius' affiliation with the neo-Stoic Justus Lipsius (1547–1606),³⁴⁸ the progenitor of Tacitism, a radically anti-Aristotelian variant of Civic Humanism that rhetorically tended towards the relatively thick' ontology of neo-Stoicism.³⁴⁹ Pre-occupied with the re-establishment of political stability during the Wars of Religion,³⁵⁰ Tacitism formulated a new republican agenda centred upon

345 Tuck, *The Rights of War and Peace*, 226:

A view of the international arena in which states had an array of thickly described obligations to one another—in which there was a genuine 'international community' resembling other human communities—would not have produced the vision of autonomous agents which actually gripped European writers four hundred years ago. That vision grew out of a sense of the world as populated by autarchic and sovereign states warily constructing temporary alliances of convenience between themselves.

346 Jurrien Goor, 'God and Trade: Morals and Religion under the Dutch East India Company', in Karl Anton Sprengard and Roderich Ptak (eds), *Maritime Asia: Profit Maximisation, Ethics and Trade Structure c. 1300–1800* (Wiesbaden: Harrasowitz Verlag, 1994), 203–20, *passim*.

347 J. Kathirithamby-Wells, 'Ethics and Entrepreneurship in Southeast Asia c. 1400–1800', in Sprengard and Ptak (eds), *Maritime Asia*, 171–87, *passim*. 'Commerce was an institution of the state which subordinated religious ethics to political ends.' Ibid. 187. It was equally well suited for the decidedly un-Calvinist levels of conspicuous consumption within the United Provinces; see Schama, *The Embarrassment of Riches*, 289–371.

348 Tuck, *Philosophy and Government 1572–1651*, 45–63.

349 Van Gelderen, 'The Machiavellian Moment and the Dutch Revolt', 206–11. Lipsius was the Flemish counterpart to the French Tacitist Michel de Montaigne (1533–92). 'Both of them stressed far more than earlier writers the sceptical element in Roman philosophy, and insisted that Aristotelian science was entirely incompatible with true humanism.' Ibid. 49. Intriguingly, Montaigne, among other things, developed an early positivist theory of jurisprudence: 'The laws are maintained in credit not because they are just but because they are laws. That is the mystical foundation of their authority; they have no other.' Cited in Peter Burke, 'Tacitism, Scepticism, and Reason of State', in J.H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (Cambridge: Cambridge University Press, 2001), 479–98 at 495.

350 Tacitism cannot 'be understood unless we remember that [its] political context was an age of international and civil wars (seen by many as religious wars), which racked Europe in the sixteenth and seventeenth centuries in the eighty years between the

a minimalist program of epistemological certainty.³⁵¹ This took two potentially contradictory forms. One, a systematic scepticism concerning absolute truth claims³⁵²; hence, the opposition to Aristotle and the revival of interest in Tacitus and the Late Stoic Seneca.³⁵³ Two, a quest for the re-establishment of absolute certainty through an a-political psychological reductionism; the governing principle of Being is now egoistic self-preservation.³⁵⁴ Lipsian Humanism was thoroughly Positivist,³⁵⁵ employing a systemically anti-normative/utopian

Revolt of the Netherlands and the Peace of Westphalia.' Ibid. 497–8. In Lipsius' own words: 'Good Lord, what firebrands of sedition hath religion kindled in this fairest part of the world [Europe]? The chief heads of our Christian commonwealths are at strife amongst themselves, and many millions of men have been brought to ruin and do daily perish, under a pretext of piety.'

Cited in Tuck, *Philosophy and Government 1572–1651*, 58.

351 Ibid. 171–72. Crucial to Tuck's viewpoint is his belief in a 'crisis of scepticism' that effectively predates Descartes by more than fifty years, extending backwards as far as the mid-16th century. See Pocock, *The Machiavellian Moment*, 3–9; Heller, 'Structuralism and Critique', 144 fn. 25; Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (New York: Free Press, 1990), 45–87; Richard H. Popkin, *The History of Scepticism From Erasmus to Descartes*, rev. ed. (London: Harper Torchbooks, 1964), 1–16.

352 'Scepticism was in large measure a reaction against conflicting claims to political legitimacy.' Burke, 'Tacitism, Scepticism, and Reason of State', 498.

353 Seneca is a key signifier within Tacitist discourse. The ontologically 'thick' neo-Stoics

turned to Seneca in preference to Cicero, and within Seneca's writings they were most interested in his remarks about *apatheia*... and the fundamental character of self-preservation, the preservation of the self not only from external attack but also from the passions which might leave it open to attack. The stress on a *social* morality and on the ethical need to subordinate one's own interests to those of one's republic disappears completely.

Tuck, *Philosophy and Government 1572–1651*, 51.

354 Ibid. 52:

The point of [Lipsius'] work is to establish *constancy* as the crown of virtues—again, a clearly anti-Ciceronian message, for constancy plays no part in the account of virtues in either Cicero or Aristotle [but] it is found in classical sources in Seneca... A rational life consists neither in political participation nor the elaboration of speculative disciplines, but in the cultivation of an *emotional* state, that of the unimpassioned and undespairing observer of events.

355 As Grotius' confidant the Dutch engineer Simon Stevin expressed it: 'Everyone must always consider as his rightful authority those who at the present are actually governing the place where he chooses his dwelling, without concerning himself about the question of whether they or their predecessors have reached their position justly or unjustly.' Cited in Burke, 'Tacitism, Scepticism, and Reason of State', 495.

Apologetic discourse.³⁵⁶ Central to the Grotian Heritage is the expression of Tacitism in coherent juro-political terms.

Grotius had one central and simple idea: that precisely because scepticism was a theory about the route to wisdom, a theory which presupposed that wise men were primarily concerned with protecting themselves from harm, sceptical ideas could be restated in the language of natural rights and duties... The fundamental character of these rights and duties also meant that they could play the role of cross-cultural universals, and Grotius himself seems to have been principally interested in this aspect of them.³⁵⁷

Accordingly

The method adopted by the celebrated jurists of antiquity is to be followed [by Grotius], the method of those who refer the art of civil government back to the very fount of nature ('naturae fonts'). Like a mathematician, [Grotius] will start by gathering rules and very general laws in order later to apply the whole to the capture of the *Catharine*.³⁵⁸

The analogical figures of both Mathematics and the Mathematician serve as key signifiers of a uniquely Grotian form of post-Tacitism.³⁵⁹

Just as the mathematicians automatically prefix to any concrete demonstration a preliminary statement of certain broad axioms on which all persons are easily agreed, in order that there may be some fixed point from which to trace the proof of what follows, so shall we point out certain rules and laws of the most general nature, presenting them as preliminary assumptions which need to be recalled rather than learned for the first

356 Expressed in the most brutal form by the arch anti-Aristotelian Humanist Guicciardini:

You may scoff at men who preach liberty. Not all of them, to be sure, but nearly all. If they thought they would be better off under a tyranny, they would rush into it post-haste. For self-interest prevails in almost all human beings, and those who recognise the value of honour and glory are few... Considering its origin carefully, all political power is rooted in violence.

Cited in Tuck, *Philosophy and Government 1572–1651*, 38.

357 Ibid. 347.

358 Frans De Pauw, *Grotius and the Law of the Sea* (Brussels: Institut de Sociologie, Universite de Bruxelles, 1965), 22.

359 Some scholars have suggested that Grotius' interest in Mathematics may be explicable in terms of his friendship with the engineer Simon Stevin. Grotius' father Jan De Groot 'was a pupil and friend of Lipsius, and assisted the mathematician Simon Stevin in some of his anti-Aristotelian experiments, including one that exactly anticipated Galileo's refutation of Aristotle's account of gravity.' Tuck, *Philosophy and Government 1572–1651*, 155.

time, with the purpose of laying a foundation upon which our conclusions may safely rest.³⁶⁰

For Tuck, this passage serves to establish Grotius as the 'true' historical progenitor of Thomas Hobbes, and, by extension, of the entirety of the Hobbesian/Realist 'tradition' of political philosophy and International Relations Theory. Tuck's comments are seminal, and deserve to be quoted at length.

By making mathematics the model for a human science Grotius made the most decisive break possible with humanism... [A] denial of the idea that there could be a science of morality comparable to mathematics or the physical sciences, and based on a set of natural laws, had been one of the starting points for the humanist movement, and it had been reinforced by the development of a new, Tacitist humanism in the late sixteenth century. Seen in its context, Grotius' move was astonishing and dramatic. But if we compare the argument of *De Indis* with that of contemporary anti-Humanists, those writers who still believed in a science of natural law, such as... the Iberian scholastics... *then we see that Grotius had not simply switched from one existing intellectual camp to another.* Instead, he sought quit explicitly to render in terms of natural law some of the main insights of the modern humanists, and to answer the sceptic not with some countervailing dogma, but by the manipulation of the sceptic's own beliefs.³⁶¹

Tuck repeats this point in his critical essay, 'Grotius and Selden'.

Grotius' return to the law of nature as the basis for his discussion led him to make the same move [as Aquinas], and to instate mathematics as the methodological model for the human sciences—a development which was to determine more than anything else the character of seventeenth-century European political thought.³⁶²

Accordingly, the core of the *Prolegomena* of *De Indis* is organised into theorem-like set of contrasting fundamental and formal rules:

360 Grotius, *De Indis*, 7. See Hendrik van Eikema Hommes, 'Grotius on Natural and International Law', *Netherlands International Law Review*, 30/1 (1983), 61–71, *passim*.

361 Tuck, *Philosophy and Government 1572–1651*, 171–2. Emphasis added.

362 Richard Tuck, 'Grotius and Selden', in J.H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (Cambridge: Cambridge University Press, 2001), 499–529 at 505; see Micheline Ishay, *Internationalism and its Betrayal* (Minneapolis: University of Minnesota Press, 1995), 13–14. Quantification is readily pressed into the service of Universalism.

The rule which decrees that 'The lesser ought not to be impermissible for him to whom the greater is permitted', rests upon precisely the same basis of certainty as the rule of the mathematicians to the effect that 'The greater cause always includes the lesser'—a principle also adopted by the jurists and quite rightly, since regard for proportion is as important in the legal realm as it is in the measurement of numbers and magnitudes.

Grotius, *De Indis*, 45.

I. What God has shown to be His Will, that is law. II. What the common consent of mankind has shown to be the will of all, that is law [*iure gentium*]. III. What each individual has indicated to be his will, that is the law with respect to him [Divisible Sovereignty] IV. What the Commonwealth has indicated to be its will, that is the law for the whole body of citizens. V. What the Commonwealth has indicated to be its will, that is the law for the individual citizens in their mutual relations. VI. What the magistrate had indicated to be his will, that is the law in regard to the whole body of citizens. VII. What the magistrate had indicated to be his will, that is the law in regard to the citizens as individuals. VIII. Whatever all states have indicated to be their will, that is the law in regard to all of them.³⁶³

For Tuck, Grotius is a singular author(ity), neither wholly Humanist nor neo-Thomist, but the embodiment of a separate albeit discontinuous set of 'principles' culminating in Thomas Hobbes.³⁶⁴ The primary rule of *De Indis* is overtly Naturalist: 'What God has shown to be His Will, that is Law.' This extreme form of Voluntarism subsequently leads Grotius to the quintessential anti-Thomistic opinion that 'A given thing is just because God wills it, rather than God wills the thing because it is just.'³⁶⁵ According to Tuck,

Like the contemporary Jesuits, whom he had not yet read,³⁶⁶ Grotius perceived that voluntarism was the most appropriate form of natural law theory for a sceptical age, for it eschewed any reliance on the principles of morality plucked from human rational introspection... But then Grotius then developed an idea which the Jesuits could not have had.³⁶⁷

363 Grotius, *De Indis*, 369–70. It is important to note that *none* of these 'Rules' explicitly appear anywhere else in the Text. Fortunately, the authoritative (determinative?) editorial intervention of the Carnegie Institution solves the reader's 'problem' for her: 'Throughout the Commentary Grotius refers repeatedly to these numbered rules and laws *without restating their content*. In order that the reader may follow the argument more readily at such points, a complete table of the precepts in question is appended to the translation (infra. pp. 369f.)'. Ibid. 8 fn. 1.

364 Tuck, 'Grotius and Selden', 58–62.

365 Grotius, *De Indis*, 8.

366 Such as Suarez. See Borschberg, 'Critical Introduction', 99–101. Suarez's discussion of Voluntarism is located in Book One, Chapters 5 and 6 of his 'A Treatise on Laws and God the Lawgiver', in id. *Selections From Three Works of Francisco Suarez, S.J.*, trans. Gwladys L. Williams, et al. with Introduction by James Brown Scott (New York; Oceana Publications: 1962), 3–646 at 58–90. See below, this chapter.

367 Tuck, *Philosophy and Government 1572–1651*, 172. However, in his later work 'On the Law of War and Peace', Grotius affirms the diametrically opposite position: *Ius naturale* 'would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of man are of no concern to Him.' Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelswey with Introduction by James Brown Scott (Oxford: Clarendon Press, 1925), 13. For numerous scholars, the 'impious hypothesis'

The profoundly ‘un-Jesuitical’ (un-Suarez?) nature of *De Indis* is magnificently displayed in the *Prolegomena*; ‘The Will of God is revealed, *not only*³⁶⁸ through oracles and supernatural portents, but *above all* in the very design of the Creator; for it is from this last source that the law of nature is derived.’³⁶⁹ For his part, Tuck endeavours to interpret this passage as indicative of an ‘anti-sceptical’ authorial

is sufficient in itself to warrant Grotius’ break with primitive legal scholarship; ‘It is an affirmation that it is possible, in this world, to separate man’s reason from God on a basis of autonomy, enabling natural law to be independent and self-sufficient.’ Tadashi Tanaka, ‘Grotius’ Method: With Special Reference to *Prolegomena*’, in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 1–31 at 29. Suarez, however, expressly contemplates the ‘impious hypothesis’ in *De legibus*, Book Two, C. 6 of *De legibus* although he ultimately rejects it; id. ‘A Treatise on Laws and God the Lawgiver’, 187–208. See D.E. Luscombe, ‘Natural Morality and Natural Law’, in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100–1600* (Cambridge: Cambridge University Press, 1982), 705–19 at 716–19. For other scholars, the Scholastic usage to which the impious hypothesis was put is enough to insure Grotius’ continuity with primitive orthodoxy.

The most common earlier argument for Grotius’ modernity maintained that he pioneered a new kind of ‘secular’ and ‘rationalist’ approach that freed the concept of natural law from the religious context in which it had been embedded. But we now understand that the famous ‘impious hypothesis’... was rather a common topos of late scholastic discourse and that Grotius could have picked it up from Suarez or from any of half a dozen sixteenth century authors.

Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Atlanta: Scholar’s Press, 1997), 319–20. Crowe postulates a connection between the ‘impious hypothesis’ and Mathematics.

Grotius’ suggestion that there would still be natural law even if there were no God was acceptable to thinkers whose methodology was open to the seduction of mathematical models. Mathematics, after all, does not in any readily acceptable sense depend upon the will of God; and if mathematical reasoning is the ideal, even in the moral and legal sciences, then a point of departure that stresses the independence enjoyed by basic principles must be an advantage.

M.B. Crowe, ‘The “Impious Hypothesis”: A Paradox in Hugo Grotius?’, *Tijdschrift voor Filosofie*, 38 (1976), 379–410 at 408. For Crowe, none of this is evidence of authorial intention; ‘Grotius was and remained a theologian. He had no intention of divorcing the natural law from theology, still less of constructing a sort of atheistic or agnostic ethic.’ Ibid. 381. By this very admission, however, Crowe implicitly recognises that the ‘impious hypothesis’ constitutes an outstanding example of the subversive potential of the logic of the dangerous supplement. Haakonssen has drawn a useful implicit distinction between Grotius’ ‘secularism and... *his secularising effect*’. Knud Haakonssen, ‘Hugo Grotius and the History of Political Thought’, *Political Theory*, 13/2 (1985), 239–65 at 249 and 247–53. Emphasis added.

368 In his account, Tuck omits this portion of the passage.

369 Grotius, *De Indis*, 8. Emphases added.

intent.³⁷⁰ Like every other good hyper-privatising capitalist since Doge Dandolo of Venice, Grotius invests the objective universal moral order with an acquisitive impulse.

Since God fashioned creation and willed its existence, every individual part thereof has received from Him certain natural properties whereby that existence may be preserved and each part guided for its own good, in conformity, one might say, with the fundamental laws inherent in its origin. From this fact the old poets and philosophers have rightfully deduced that love, whose primary force and action was directed to self-interest, is the first principle of the whole natural order. Consequently... expediency might be called the mother of justice and equity. For all things in nature, as Cicero repeatedly insists, are tenderly regardful of self, and seek their own happiness and security. This phenomenon can be observed not only in the human race, but among the beasts also, and even in connection with inanimate objects, being a manifestation of that true and divinely inspired self-love, which is laudable in every phase of creation. As for...an immoderate self-interest—it is an excess of such love.³⁷¹

As we have now come to expect, *De Indis* is premised upon *two* expressly postulated ‘laws of nature,’ the descending one of the ‘thick’ ontology of the Stoics and the ascending one of the ‘thin’ ontology of the Aristotelians.

First, that it shall be permissible to defend life and to shun that which threatens to prove injurious; secondly, that It shall be permissible to acquire for oneself, and to return, those things which are useful for life. The latter precept, indeed, we shall interpret with Cicero as an admission that each individual may, without violating the precepts of nature, prefer to see acquired for himself rather than for another, that which is important for the conduct of life. Moreover, no member of any sect of philosophers, when embarking upon a division of the ends [of good and evil] has ever failed to lay down these two laws first of all as indisputable axioms. For on this point the Stoics, the Epicureans, and the Peripatetics are in complete agreement, and even apparently the Academics [i.e. the Sceptics] have entertained no doubt... let no one inflict injury upon his fellows... let no one seize possession of that which has been taken into the possession of another. The former is the law of inoffensiveness; the latter is the law of abstinence.³⁷²

370 ‘Grotius... [was] responding to a straightforward pre-Humean moral scepticism, which simply pointed to the multiplicity of beliefs and practices around the world, and concluded that there were no common moral beliefs and hence nothing stable upon which to build a universal ethics.’ Richard Tuck, ‘The “Modern” Theory of Natural Law,’ in Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), 99–119 at 114–15. See Tuck, ‘Grotius and Selden,’ *passim*.

371 Grotius, *De Indis*, 9.

372 Ibid. 10–11.

In the event of irrepressible conflict between the two principles, self-preservation ('self-love') is paramount.

The order of the presentation of the first set of laws and of those following immediately thereafter has indicated that one's own good takes precedence over the good of another person... or, let us say, it indicates that by nature's ordinance each individual should be desirous of his own good fortune in preference to that of another, which is the purport of the proverb; 'I myself am my own closest neighbour.'³⁷³

As altruism is derivative from, and, therefore, both ontologically inferior and ethically subordinate to 'self-interest,' what Tuck has named 'the minimal moral life'³⁷⁴ serves as the sceptic-proof *grundnorm* of Civil Society, both national and international: 'The function of... justice is twofold, namely: in regard to the good, the preservation thereof; in regard to evil, its correction. Hence these two laws arise: first, Evil deeds must be corrected; secondly, Good deeds must be recompensed'³⁷⁵... Expediency might perhaps be called the mother of justice and mercy'³⁷⁶

When rhetorically combined with the descending argumentation of 'thick' ontology, the principles of a 'minimal moral philosophy' can easily serve as the foundational precepts of a highly efficacious and 'self-stabilising' trans-national civil society, derived, in turn, from the 'thin' ontological principles of *dominium* and *proprietas*.³⁷⁷ The formation of such an international public order, coupled with the normative tenets of moral minimalism, correspond remarkably well with the Capitalist World-Economy, a hegemonically self-regulating global network of

373 Ibid. 21. Grotius *does* limit the harshness of this passage somewhat by qualifying the sentiment:

Nevertheless, in questions involving a comparison between the good of single individuals and the good of all (both of which can be correctly described as 'one's own,' since the term 'all' does in fact refer to a species of unit) the more general concept should take precedence on the ground that it includes the good of individuals as well. In other words, the cargo cannot be saved unless the ship is preserved.

Robert C. Shaver, 'Grotius on Scepticism and Self-Interest,' *Archiv für Geschichte der Philosophie*, 78 (1996), 27–47, *passim*. Grotius' qualification may be reflected of a relative shift towards the ontologically 'thicker' Ciceronian variant of Humanism, premised upon the organic unity of society and the 'naturalness' of altruistic sociability. See Cary J. Nederman, 'Nature, Sin and the Origins of Society: The Ciceronian Tradition in Medieval Political Thought,' *Journal of the History of Ideas*, 49/1 (1988), 3–26, *passim*.

374 Tuck, *Philosophy and Government 1572–1651*, 174.

375 Grotius, *De Indis*, 15.

376 Ibid. 9.

377 Ibid. 12–14 and 93.

surplus extraction and re-distribution. Consistent with the voluntaristic ontology of Althusius,³⁷⁸ a global economy was created

not with the intention of abolishing the society which links all men as a whole, but rather in order to fortify that society by a more dependable means of protection, and at the same time, with the purpose of bringing together under a more convenient arrangement the numerous different products of many person's labour which are required for the uses of human life. For it is a fact... that when universal goods are separately distributed, each man's ills pertain to him individually, whereas when those goods are brought together and intermingled, individual ills cease to be the main concern of any one person and the goods of all pertain to all.³⁷⁹

Corporate Sovereignty serves as the paradigm for a new form of global governance deliberately finessed to meet the needs of the World-Economy. Civil Society, in both its intra- and interstate dimensions, replicates, in turn, the duality of Nature Law derived from the binary pairing of Inoffensiveness and Abstinence, the later a cardinal Calvinist virtue.

First, Individual citizens [which may mean natural persons, corporate bodies, or 'States'] should not only refrain from injuring other citizens, but should furthermore protect them, both as a whole and as individuals; secondly, Citizen's should not only refrain from seizing one another's possessions, whether they be held privately or in common, but should furthermore contribute individually both that which is necessary to other individuals and that which is necessary to the whole... These two laws, then, are directed in a certain sense to the common good. Though not to that phase of the concept from which the laws of the third order³⁸⁰ are concerned, namely, the good of the different individuals composing the community. They relate rather to the common good interpreted as the good of the unit and therefore as one's own.³⁸¹

Within Civil Society, the individual has voluntarily subordinated self-interest to the common good through what be may characterised as a 'primitive' form of social contract theory.³⁸² Inter-personal violence is justifiable however, if it can be shown to be consistent with a legitimate defence of *ius*: 'Grotius endorsed for the state the most far-reaching rights to make war which were available in the contemporary repertoire.'³⁸³ The Naturalist legitimization of 'thin' ontology operates

378 See above, Chapter Three.

379 Ibid. 19.

380 Punishment; here, the seizure of the *Santa Catarina*.

381 Ibid. 21.

382 Haakonssen, 'Hugo Grotius and the History of Political Thought', 239–46.

383 Tuck, *The Rights of War and Peace*, 108.

‘strongly’ within minimal international civil society in order to provide it with the requisite degree of uniformity necessary for successful global governance.³⁸⁴

Paradoxically, the ‘private right’ to self-defence itself constitutes an integral component of public authority, thanks to Grotius’ idiosyncratic Tacitist reformulation of the orthodox Aristotelian theory of justice. Within the conventional Aristotelian/Humanist schema, Justice is taxonomically classified under two main headings: (i) ‘General’ or ‘Universal’, the collective aggregation of all forms of moral virtue, both natural and social; and (ii) ‘Particular’ or ‘Special’, which does not reside in Nature as such, but is unique to Civil Society. However, in a markedly un-Aristotelian manoeuvre,³⁸⁵ ‘Particular’ justice is then explicitly divided into two separate sub-components: (i) ‘Commutative’ justice, the positive right and obligation to punish transgressors; and (ii) ‘Distributive’ justice, the right to legislate and enforce an equitable distribution of goods and resources. *De Indis* appears to move decisively towards an exclusively rhetorical form of argument, the most radical form of apologetic discourse, predicated upon the rhetorical linkage between Corporate Sovereignty and Just War.

VII *Respublica* and Self-Defence

Central to the Grotian variant of normative holism is the globalisation of Commutative Justice as the basis of an international public order governed by *ius naturale*.³⁸⁶ Chastisement ‘has as its aim the correction of one individual’, while ‘Exemplary Punishment’ is ‘aimed at the correction of all other persons, in addition to that one’; the ‘attainment of these two objectives tends to a third: universal security. For if all persons conduct themselves aright, it necessarily follows that no one will suffer wrongfully.’³⁸⁷ *De Indis* postulates a necessary correlation between non-aggressive warfare and republicanism. The Just War is expressly defined as the lawful resort to self-defence, even in the event of what may be characterised as—employing contemporary terminology—‘humanitarian intervention’.

According to Seneca, ‘He who does not attack my own country but nevertheless oppresses his own, harassing his people though he keeps aloof from mine, has destroyed by the depravity of his spirit that fellowship based upon human rights which he shared with me, so that my duty to the whole of mankind is a consideration more fundamental and more powerful than my duty to that one man’... To be sure, in striving for the good of others, we strive for our own good, also. For it is important to the security of all that injuries [to any person] shall be warded off, lest the perpetrators of injurious acts, rendered more powerful thereby, should at some future time rise up against us too, and also in order that that others may not be encouraged to wrongdoing by a multitude of

384 ‘There is no significant moral difference between individuals and states, and that both may use violence in the same way and for the same ends.’ Ibid. 85.

385 Tanaka, ‘Grotius’ Method’, 21–2.

386 See Borschberg, ‘Critical Introduction’, 136–68.

387 Grotius, *De Indis*, 17.

instances in which injurious conduct has gone unpunished. Furthermore, it is a fact worth noting that, just as a state often undertakes a public war for the personal benefit of citizens... so also citizens take up arms privately for the state.³⁸⁸

This passage operates on a number of discursive levels. Firstly, there is the trademark iterability between private and public forms of international agency, derived from the Original Personality of the Corporate Sovereign. Secondly, 'self-defence', even in a somewhat 'pre-emptive' form, serves as a central component of hegemony, in this case as the ideological or symbolic validation of the international rule of law. The VOC correctly behaves as the true 'surrogate of government', through its lawful enforcement of jurisdiction and protection. *De Indis* achieves a 'double legitimation'; the legality of Dutch violence against the Portuguese is both the grounds for and the sign of the licit hegemony of the United Provinces. Strikingly, the Text formally abjures Gentili's doctrine of the 'pre-emptive strike' or *utilis defensio* as a necessary device for maintaining the international balance of power.³⁸⁹ The illegitimacy of the anticipatory attack is a logical corollary of Naturalism; 'thick' ontology necessitates the unconditional legality of *bellum iustum* as a 'strong' right, something which pre-emptive action would necessarily violate.

Prior to the Grotian text, Particular Justice is derived from General, just as *proprietas* is subordinate to *communio* (re. Suarez). As with his previous treatment of *proprietas/communio*, Grotius accomplishes a second-order inversion of established hierarchies by severing the taxonomic linkage between Universal and Particular. Universal justice is now *exclusively* identified with Commutative, and Particular justice with Distributive, thereby subordinating the socially derived right to distribute property to the natural/'cosmic' right to punish transgressors against public order, which, in the Grotian perspective, would most frequently involve acts of theft or unlawful expropriation of property.³⁹⁰ There is now a universal natural right to exercise organised violence in the event of transgression against private property, the Just War serving as the expressive medium of the maintenance of international public order/Civil Society. Dutch Corporate interests and hegemonic functions have fused perfectly.

War is waged by the virtuous in order that justice may be enjoyed; and justice is the very same quality that is called 'peace' with reference to the community, whereas with reference to subjects in their relation to rulers it is called 'ready obedience'... Accordingly,

388 Ibid. 127. This passage appears to be inspired by Gentili in his own 'On the Law of War'; see id. *De Iure Belli Libri Tres*, with Introduction by Coleman Phillipson (New York: Oceana Publications, 1964), 124–5 and 163–6.

389 Ibid. 93–5 and 104–5.

390 'Just War is... a reaction against a wrong, a procedure either in tort (restitution, reparations, guarantees) or in criminal law (punishment, sanctions).' Josef L. Kunz, 'Bellum Iustum and Bellum Legale,' *American Journal of International Law*, 45 (1951), 528–34 at 530.

the peace set up as an objective for belligerents is not any kind of peace whatsoever, but solely and exclusively the kind that is just and honourable... Thus the kind of peace suggested as the proper aim of belligerents is nothing more than the repulsion of injury, or (and this, in the end, amounts to the same thing) the attainment of rights, not only one's own but also, at times, the rights of others... To be sure, in striving thus for the good of others, we strive for our own good, also. For it is important to the security of all that injuries [to any person] shall be warded off, lest the perpetrators of the injurious acts, rendered more powerful thereby, should not in the future rise up against us too; and also in order that others may not be encouraged to wrongdoing by a multitude of instances in which injurious conduct has not gone unpunished. Furthermore, it is a fact worth noting that, *just as a state often undertakes a public war for the personal benefit of citizens... so also citizens take up arms privately for the benefit of the state.*³⁹¹

Discursively, this marks an 'apologetic' privatisation of international society (re. Koskenniemi).

In other words, Grotius claimed that in some sense the universal relations of men were like a civil society in that commutative justice could straightforwardly apply to their dealings in the state of nature; but these relations were like a very thin version of human society, since they established considerations of distributive justice. This fracturing of the Aristotelian notion of social life was at the heart of Grotius' enterprise. So when Grotius talked about human sociability in the *De Indis*, he did not mean that natural men were social in anything like the *Aristotelian* sense. Instead, he might say that they were sociable in the Epicurean sense, for... Epicureanism did permit a thin notion of human sociability.³⁹²

Prima facie, the 'thin' ontology of materialist Epicureanism should correlate with a minimal morality, both private and public. Philosophically, Grotius' open reliance upon Epicurus constitutes the most extreme formulation of minimal morality possible within seventeenth-century standards. Juridically, the enforcement of minimal morality mandates the inversion of *all* legal distinctions between the State and the Private/Natural Person.

This was the kind of sovereign *res publica*, then, which Grotius had in mind when he argued that the natural individual was, morally speaking, like a miniature sovereign state, to which the vocabulary of liberty and sovereignty could be applied... The relationship between men in a civil society were broadly like the relationship of the sovereign republics of the United Provinces in their [con-federal] Union; guarded co-operation with a great deal held back by the parties and with a great deal requiring unanimity³⁹³... [The] tradition which we find articulated clearly for the first time in the *De Indis* [is] that we

391 Grotius, *De Indis*, 125–7.

392 Tuck, *The Rights of War and Peace*, 89.

393 Very much like a Board meeting of *Die Heeren XVII*.

can best understand the rights which individuals possess vis-à-vis each one another (outside the arbitrary and contingent circumstances of their civil agreements) by looking at the rights which sovereign states seem to possess against one another.³⁹⁴

The deployment of Natural Law in juridically governing heterogenous trans-national space is itself the medium through which the Original Personality of international private actors emerges. The full implications of this discursive stratagem will be discussed in the next chapter.

394 Ibid. 85 and 84.

Chapter Six

TRACE (II): Utopia and Late Scholasticism

My central task has been to establish that the over-arching rhetorical stratagem of *De Indis* is one of migration, replicating in miniature Koskenniemi's more general critique of International Law as a repetitive oscillation between ascending (Positivism) and descending (Naturalist) modes of argumentation. In the previous chapter, I have shown that Grotius' Civic Humanism, the discursive formation with which he is most commonly associated, could not provide a self-grounding foundation for the sort of textual project evidenced in *De Indis*. The 'thin' ontology of the Text had to be repeatedly supplemented by a 'thick' ontology at certain crucial rhetorical junctures. In this chapter, I shall undertake a similar critique of what is commonly viewed as the Text's 'repressed' pole of *differance*, Late Scholasticism. As I have already established, virtually all of the primary discursive objects of *De Indis*—divisible sovereignty, *res extra commercium*, Corporate Sovereignty, international Just War—all embedded within the trans-national juridical landscape of the early Modern World-System of the 'long' 16th century, requiring consideration of the juridical dimensions of the items of concern within the terms of heterogeneity and pluralism. While I intend to prove that it is a mistake to interpret *De Indis* as a predominantly Humanist Text—a point that I have already alluded to in Chapters Four and Five—I will also be highlighting the various ways in which Grotius was equally unable to hold to a consistently descending, or 'utopian', form of rhetoric. Expressed in somewhat more prosaic terms, the issue here is the 'real' reason for the Author's express and considerable reliance upon Late Scholastic authority.

The appearance of certain key terms within *De Indis* de-noting Law as a 'metaphysical system,'¹ such as *lex divina* or *lex aeterna*, signify both the absence of the 'thin' ontology of secular Civic Humanism and the presence of the 'thick' ontology of theological Late Scholasticism; within the Grotian Text, the presence of Divine and Eternal Law, or Right, 'opens the way for a celestial dimension of legal obligations and a corresponding heavenly reward for obedience.'² For Aquinas, Law

1 Christoph A. Stumpf, *The Grotian Theology of International Law: Hugo Grotius and the Moral Foundations of International Relations* (Berlin: Walter de Gruyter, 2006), 2.

2 Ibid. 97.

is ‘fundamentally and primarily connected with reason, *ratio*’, which is identical with Providential Being that governs creation: ‘the eternal law [*lex aeterna*] is nothing other than the *ratio* of divine wisdom, in its aspect as directing all actions and all motions.’³ The sheer proliferation of Grotian theological treatises composed throughout the period of the juvenilia—the *Meletius sive de lis Quae inter Christianos Conveniunt Epistola* (1611), *De Imperio Summarum Potestatum circa sacra* (1614), and *Defensio Fidei Catholicae de Satisfactione Christi* (1617)—all signify an Author immersed in the imaginary of the theological.⁴

Natural Right [*ius naturale*] as a distinct category of Divine Right [*ius divina*] presents the overarching category in Grotius’ theology of International Right: the principles of Natural Right have their source in the rationality of God’s creation; consequently, matters of divine truth, which had only been revealed subsequent to creation, remain outside its scope. Thus Natural Right for Grotius does not represent the full divine truth, though it certainly is fully compatible with the divine will in its entirety.⁵

The question that now emerges is *why* a ‘young Humanist’ such as Grotius felt compelled to make such a strong and arresting shift towards the ‘thick’ ontology of the Salamancan School. This is all the more surprising when we consider that the greater portion of the republican treatises published during the period of the Grotian juvenilia unambiguously evidence a favouring of Civic Humanism as the dominant pole of discourse. This is clearly evidenced by the most important political treatises published by the early Grotius, *De Antiquitate Reipublicae Batavicae* (1610). In her powerful assessment of the republican motif within the Grotian corpus, Brett makes clear the preponderance of the Author’s rhetorical inclination towards the signs of Humanist discourse, political monism and ‘thin’ ontology, culminating in the master-sign of *civitas*.

[Grotius’] focus is always on a humanly created order which transcends the individual: the *civitas* or *respublica* (the ‘city’) governed by civil law [*ius civile*], and the international order governed by the law of nations. The first goal of Grotius’ political inquiry is to analyse the structure of the city—more specifically, the city understood as a cohesive

3 Aquinas, cited in Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 95.

4 In a somewhat a-political manner Stumpf has argued that it probably belies human nature to conceive of a scholar who is fully devoted to proposing a return to the fundamental dogmatics of the church fathers in elaborated theological treatises on one day, just to free himself of any such theological preconditioning in order to display himself as the avant-garde of a secular jurisprudence the next day.

Ibid. 5. Once again, the problem here is Authorial Presence. I would argue that the real question is not one of Authorial belief or intent but of discourse. Where Stumpf is undeniably correct is in arguing for the ‘controlling’ presence of the Theological within Grotian jurisprudence.

5 Ibid. 15.

body or *unity* of some kind. This understanding is, I suggest, common to all the different types of what is generally considered ‘civil philosophy’ in this period—republicanism or ‘civic humanism’ with its concern for internal concord... [and] how to construct such a unity out of the natural plurality and diversity of individuals.⁶

De Antiquitate’s status as a Humanist Text is signified by two critical rhetorical manoeuvres stereotypical of Civic Humanism. The first is an express invocation of the authority of both Polybius and Aristotle. Following classical Humanist discourse, Grotius draws an express parallel between the Hollander republic—Batavia—and the that stalwart favourite of classical Republicanism, Sparta: ‘Now if a foreign parallel of [Batavia] is required, I find nothing more similar than the Spartan state, which is praised above others in the testimonies of Plato, Polybius and many other wise men.’⁷ In a supplemental manner, Grotius rhetorically represents the ancient constitutional freedoms of the Batavians in terms of resistance to the Aristotelian notion of anti-republican tyranny; accordingly, we read that ‘Human nature has a tendency for domination, and this is why, according to Aristotle, most tyrannies emerge; that is, when princes transgress the boundaries set by ancestral law.’⁸ The second is an implicit invocation of Bodin’s theory of indivisible sovereignty, the *summa maiestas* of the *civitas* dependent upon the suffusing presence of a monistic unity.

In the same way in which a house can continue to exist, even if you change one or more parts, but ceases to exist if you break up the foundations, a constitution does not immediately become a different one if the names and functions of its magistrates change, as long as the main force of the government and the supreme power, and the mind, so to speak, that moves and binds the whole, remain one and the same.⁹

Nevertheless, when we consider the true discursive object of *De Indis*—the Corporation rather than the ‘City’ or the ‘State’—and the juridical landscape within which the Text was discursively situated—inter-state rather than intra-state—it soon becomes evident why a fully Humanist approach had to be abandoned. As

6 Annabel Brett, ‘Natural Right and Civil Community: the Civil Philosophy of Hugo Grotius’, *Historical Journal*, 45/1 (2002), 31–51 at 32.

7 Hugo Grotius, *The Antiquity of the Batavian Republic*, ed. And trans. Jan Waszink et al., with Notes by Peter Scriverius (Assen: Van Gorcum, 2000), 95.

8 Ibid. 99.

9 Ibid. 51. This theme is re-visited in Chapter V, ‘What the State of the Batavians, that is the Hollanders, was like in the Period of the Counts’:

For very true is the saying of the ancients, that a state is preserved intact, as long as there is a strong unanimity within it, but that it will fall apart, when this harmony is broken: which harmony I understand not to be a harmony of strings or tones, but rather a well ordered harmony of the prince with the people, of the people with the prince and of the estates among each other.

Ibid. 95.

I have already established in Chapter Four, Civic Humanism proved itself both logically and rhetorically incapable of treating the heterogenous nature of the corporate body of the Althusian tradition. If the discursive subject of the Text is 'difference' rather than 'sameness', then the rhetorical strategy that must be employed is one that is fully compatible with the discursive presence of heterogeneity, not homogeneity. We can witness this 'slide' towards difference even within the robustly Humanist Text of *De Antiquitate*, with the invocation of a conventionally Late Scholastic doctrine of the social compact.¹⁰

Now since these laws [of Holland] are conditions attached to the possession of governmental power, it is also clear that the prince had no power whatsoever to free himself from these laws; which is also amply testified by those who have written on constitutional law. From this, it also follows—since sovereignty does not reside with him, whose power is limited by some positive law [*cum summa maiestas non sit penes eum, qui iure aliquo constituto teneatur*], as is the case with most northern princes—that the Count of Holland, who is bound by so many laws, does not by himself possess sovereignty [*summae maiestatis*].¹¹

Again, the invocation of the Humanist notion of indivisible sovereignty underscores point that rhetorical shift from indivisible to divisible sovereignty is dependent upon the identity of the discursive object of the Text in question, the 'City' or the 'Corporation'. In a similar manner, the Text invests the Batavians with an inalienable right of resistance.¹² Here the contemporary relevance of the predicament of the ancient Batavians with the modern Hollanders is underscored through the trans-historical identification of the Roman and Iberian empires; 'For what could be a greater danger to this freedom than the power of the Romans, and recently of the Spanish, which comes close to the Roman power, or, as they think themselves, even surpasses it?'¹³ Finally, *De Antiquitate* defects from a stereotypical Humanist position by openly celebrating the *con-federal* nature of the Republic of Holland; strikingly ironic is the Text's eulogy of the ascending hierarchy of constitutional divisions that were so lamented in *De Republica emendanda*.¹⁴ Furthermore, there is no mention of the 'United Provinces'; the exclusive 'level of analysis' of the Text is the provincial—Holland and Zeeland—consistent with the principles of republican Corporatism.

Interpreted this way, *De Antiquitate* is perfectly consistent with the general contours of Dutch republican discourse. By reflecting the de facto constitutional settlement of the Union of Utrecht, the anonymous *Brief Discourse on the Peace Negotiations Now Taking Place at Cologne Between the King of Spain and the States*

¹⁰ Ibid. 83–97.

¹¹ Ibid. 91.

¹² Ibid. 99–103.

¹³ Ibid. 49.

¹⁴ See above, Chapter Five.

of the Netherlands (1579)¹⁵ and the *Short Exposition of the Right exercised from All Old Times by the Knighthood, Nobles and Towns of Holland and Westvriesland for the Maintenance of the Liberties, Rights, Privileges and Laudable Customs of the Country* (1587) by Francois Vrank¹⁶ both assume the con-federalist argument of State sovereignty underpinned by the anti-monistic delegation theory of political authority.

Thus it is clear enough that the States are authorised to take up arms against the Princes who exceed the limits of their office with open tyranny. Their can be no doubt that they are entitled to propose and demand things which, in their view, seem appropriate to the good of the inhabitants of the country and which by consequence, they should also obtain from their prince.¹⁷

The right to resistance, a quintessential Scholastic innovation, is crucial for my analysis, for the very reason made clear by Van Gelderen: ‘There is a remarkable similarity to be noted between Dutch republican conceptions of liberty and what Skinner has called “the scholastic defence of liberty”, as developed in the course of the fourteenth century by seminal [pre-conciliar] authors such as Bartolus of Sassoferrato.’¹⁸ The Scholastic ‘defence’, or ‘concept’ of *libertas*, in turn, is inseparable from an ontologically ‘thick’ identification of *ius* with subjective right. As Brett has admirably demonstrated, this very precise chain of signs and signifiers was central to the discursive formation(s) of the School of Salamanca.

Nature and natural law, seen as a set of substantive rules of action which form an unchanging baseline of moral rectitude, generate precisely the threat to the legal autonomy or integrity of the city that civil philosophy strove to avoid. Seen in this way it constitutes a non-civic and pre-civic standard against which the city might be judged and to which individuals might appeal. It is this kind of [Scholastic] natural law theory

15 Anonymous, ‘Brief Discourse’, in Martin van Gelderen (ed.), *The Dutch Revolt* (Cambridge: Cambridge University Press, 1993), 123–64, *passim*.

16 Francois Vrank, ‘Short Exposition’, in Martin van Gelderen (ed.), *The Dutch Revolt* (Cambridge: Cambridge University Press, 1993), 227–38, *passim*.

17 Anonymous, ‘Brief Discourse’, 136.

18 Martin van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590* (Cambridge: Cambridge University Press, 1985), 284. See also, Quentin Skinner, *The Foundations of Modern Political Thought. Volume One: The Renaissance* (Cambridge: Cambridge University Press, 1978), 53–66; see above, Chapter Four. It is necessary to consider that the entrenched and lingering Roman Catholicism of the urban patriciate may have played a role in the proclivity of Dutch authors for Iberian authorities. Alastair Duke, *Reformation and Revolt in the Low Countries* (London: Hambledon, 2003), 239.

At the risk of sociological determinism, it may be possible to interpret both Grotius and the larger controversy over Arminianism within the early Dutch Republic as a clandestine attempt by the ubiquitous urban patriciate to continue with Roman Catholicism by other means. *Ibid*.

which lies at the base of sixteenth-century resistance theory and which was used in the justification of civil war.¹⁹

The ontologically ‘thick’ variant of *ius naturale* diverges from classical Aristotelianism precisely through its Christian innovation of re-formulating *telos* in terms of an attribute of Providential Being. For Thomas’ successors, ‘legitimate subjective activity was very much a question of right. The course of the Thomist tradition had drawn upon [the notion of subjective right]... which connected right primarily with nature as that faculty justifying action which is the result of each nature’s natural inclination to its own good.’²⁰ The master-sign of Thomist/Christian Aristotelianism is expressed in juridical form through the correlation between Law/*lex* and *ratio*, which is a sign of God (=Presence), juridically identical with *lex aeterna*; ‘God... out of eternity conceived in his mind the order and dispensation and rule of the universe of things, in the likeness of which conception all laws are to be constituted: that ordainment and commandment therefore is called eternal law in accordance with its nature.’²¹ Natural Law descends from Eternal Law, governing the ‘proper’ sphere of human activity.

[B]ecause... God is the author of nature, he ingrafted in individual things each their own instincts and stimuli by which they might be driven towards their ends; but on man particularly he impressed a natural form into his mind which would govern him according to reason which is natural to him: and this is the natural law: viz. of those principles which without discursive reasoning are *per se* apparent by natural illumination.²²

‘Thick’ ontology yields a *telos* that is both the basis of inalienable right to *libertas* that also successfully envelops the subordinate pole of ontologically ‘thin’ Civic Humanism.

[J]ust as with all other things to their ends, so even more so is there implanted in man by nature (which is the work of God) an inclination and force towards that by which he conforms to the eternal law. For we are born to the virtues (as in Book II of the Ethics of Aristotle)... [Therefore] as much according to his cognition, as according to his propensity for the good—both necessary for free motion—human actions are subject to the eternal law.²³

Finally, it is *auctoritas*, or the right authority requirement of Just War that prevents private political action by making the right to resistance a ‘public good’. The

19 Brett, ‘Natural Right and Civil Community’, 33.

20 Brett, *Liberty, Right, and Nature*, 138.

21 Domingo de Soto, cited in *ibid.* 141–2.

22 Domingo de Soto, cited in *ibid.* 142.

23 Domingo de Soto, cited in *ibid.* 142–3.

anonymous author of the *Brief Discourse* thus shows himself (or herself) to be a Late Scholastic at a strategically decisive moment within the Text.

Indeed, Thomas Aquinas (who is yet regarded as the Calvin of the Roman Church) argues... that there is merit in killing a Tyrant. And that one may kill a tyrant freely and without objection, and with good reason, is proven at length with firm and almost innumerable authorities and examples by... the Lord Soto... [who argues that] insofar as a tyrant is a lawful Prince, either by law, of succession or election, a private person is not allowed to kill him because of his tyranny. Thereby [he gives] plainly to understand that the States of the country and those who represent the subjects are, as public persons, permitted to do so. Indeed, these are obliged to take up arms against such a tyrant, and are not only allowed to resist him, but also to offend him and if possible to harm his body and goods.²⁴

If one shifts from the intra-state space of *De Antiquitate* to the inter-state space of *De Indis*, then we can discern a very precise correlation between the right to resistance and Just War, both Late Scholastic constructs that discursively rely upon a descending and ontologically 'thick' mode of argumentation. This, in fact, constitutes my main criticism of Brett; she fails to adequately consider Grotius within the terms of the trans-national landscape of the 'long' 16th century. As Brett herself points out, 'the primary characteristic of right in the Aristotelian tradition—right as the object of justice—is that it is *ad alterum*, towards another. Right is social; that is, it occurs between equal members of a civil or political society, who alone can properly be called "others"'.²⁵ Consequently, any attempt to ground a comprehensive and internally consistent model of primitive International Law will be unable to reside exclusively at the Humanist pole of discourse. As I have already shown in Chapters Four and Five, in the Salamanca tradition 'war is perceived as a necessary evil for the restoration of a just legal order and the enforcement of Right in the international arena, where no state jurisdiction [*imperium*] is effective'.²⁶ What is essential to understand concerning *De Indis* is that the Text serves as the discursive template through which the Author is able to re-formulate the Scholastic doctrine of the right of resistance within the neo-Thomistic terms of *ius bellum* now projected globally as a means of rendering the early Modern World-System compatible with a republican paradigm of governance; 'war is for Grotius simply a problem of upholding the order of Right through the employment of force which is closely related to the exercise of jurisdiction [*imperium*] in human affairs'.²⁷ My reasoning here is in all essentials

24 Jacob Heyndrix, 'Political Education', in Martin van Gelderen (ed.), *The Dutch Revolt* (Cambridge: Cambridge University Press, 1993), 165–226 at 190–1.

25 Brett, *Liberty, Right and Nature*, 112.

26 Stumpf, *The Grotian Theology of International Law*, 203.

27 Ibid. 212. Compare Stumpf with Nablusi on this point; the 'Grotian tradition defines the very project of the modern laws of war: to regulate, mitigate, and standardize practices of warfare. Most crucially, Grotian legal norms lie at the heart of the

identical with those of Zuckert, who also insists upon an 'internationalist' reading of the Grotian corpus.

It is tempting to attribute the differences between Grotius and his predecessors to the Dutchman's announced aim of developing more fully and more consistently than had ever been done before, a code of the 'law of nations'—the legal rules that prevail among, rather than within, political communities. Since none of his predecessors had put that concern at the centre of his thinking, it is plausible to think that Grotius' new concern with the law of nations led him to pose the question of the basis (if any) for the use of force, the waging of war, by one community against another. Since Grotius is convinced that war is sometimes just and therefore justified, he concluded that the rightful use of force by some against others cannot be limited to the situation in which all the people in question are fellow citizens or members of the same political community.²⁸

I argue that that *De Indis* is best understood as a legal treatise for the legitimate conduct of *ius bellum* by a Corporate Sovereign. The Text possesses no authorial 'essence'; it is neither fully Humanist nor wholly Scholastic. However, insofar as it is correct to interpret *De Indis* in terms of a cognisably republican form of primitive international public order, commensurate with the Dutch cycle of systemic accumulation within the early Capitalist World-Economy, then, contrary to contemporary opinion, Late Scholasticism must be understood as forming the dominant pole of the Text. My account, therefore, differs from Brett's exemplary but a-political account²⁹ by locating the critical Grotian innovations of Late Scho-

enterprise of distinguishing among types of war and classes of combatants.' Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999), 128.

28 Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994), 125–6.

29 In Brett's own words:

My concern is... primarily with identifying the different languages (idioms or rhetorics) of rights within late medieval and renaissance discourse, i.e. with that side of intellectual history wherein the historian tends to become an 'archaeologist', revealing and tracing buried seams of language... In so far as I have chartered developments or mutations within these languages, my focus has been on the intellectual context which provided the immediate orientation for the authors involved. I have not discussed in detail wider issues of political, social and economic milieu. My concern has been rather with the relations between texts, with exposing the ways in which, and the extent to which, these books 'speak of other books', and in so doing lay down their distinctive 'ways of speaking'.

Brett, *Liberty, Right and Nature*, 7 fn. 19. What Brett is describing is an exercise that would fully fit the (nebulous) criteria of 'Post-Structuralism'. In truth, her evocation of 'archaeology', books 'speaking' of other books and their respective 'ways of speaking' encapsulates perfectly Foucault's pioneering notion of the 'archaeology of knowledge'; yet any reference to either Foucault or Deconstruction is wholly absent from her Text.

lasticism within the contours of the juro-political landscape of the early Modern Colonialist World-System.

I *Respublica* and the Privatisation of Just War

The key to rendering intelligible the ‘chaotic’ discursive oscillations between apologetic Humanism and utopian Scholasticism is a detailed inter-textual reading of Grotius and his outstanding neo-Thomistic ‘Other’, Vitoria. Remarkably for a Late Scholastic, Vitoria, like Grotius, expressly affirms the legality of Private Just War.

Any person, even a private citizen, may declare and wage defensive warfare. This is clear from the principle ‘force can be resisted by force’... From this we may gather that any person may wage war without any other person’s authority, not only for self-defence but also for the defence of their property and goods.³⁰

The legitimating principle of this otherwise inexplicable breach with orthodox Thomism is *necessitatis*.

The license and authority to wage war may be conferred by necessity. If, for example, one city attacks another in the same kingdom, or if a duke attacks another duke, and if the king fails, through negligence or timidity, to avenge the damage done, then the injured part, city, or duke, may not only defend itself, but may also carry the war into its attacker’s territory and teach its enemies a lesson, even killing the wrongdoers. Otherwise, the injured party would have no adequate self-defence; enemies would not abstain from harming others, if their victims were content only to defend themselves. *By the same argument, even a private individual may attack his enemy if there is no other way open to him of defending himself from him.*³¹

However, even if self-defence in the face of princely impotence or neglect is compatible with the requirements of Just War,³² it remains unclear how Vitoria can reconcile neo-Thomism with the lawful violence of private actors.

I hold that there is a distinction between private persons and states; for, granting that a private person may defend himself and his property, it is nevertheless impermissible for him to avenge himself or to reclaim his own property save through the judge. *For if it*

30 Francisco de Vitoria, ‘On the Law of War’, in id. *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 293–327 at 299.

31 Ibid. 302. Emphasis added.

32 Jonathan Barnes, ‘The Just War’, in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 1100–1600* (Cambridge: Cambridge University Press, 1982), 771–84 at 777.

were permissible for him to do so in a different manner; that is, if any person whatsoever were the judge of his own cause, it would not be possible to govern the world. For such [a state of affairs] would be contrary not only to divine law, but also to natural law.³³

The crucial sentence is the last one; Vitoria cannot conflate private with public agency because of the relatively ‘thick’ ontological requirements of Thomistic neo-Realism. It becomes necessary to historically situate *De Iure Belli* (1539) within its proper discursive framework; the Text is in fact a supplement to an earlier treatise legitimating the dispossession of indigenous peoples, *De Indis* (1537–8). As a ‘supplemental’ Text, therefore, it is embedded within a wider discursive formation from which it receives its rhetorical orientation. The full title of ‘On the Laws of War’ is *De Indis Relectio Posterior, sive de iure belli*; it is within this later Text that Vitoria expressly links Just War with the practice of aboriginal dispossession. ‘It emerges finally, after the lengthy discussion in my first relection on the just and unjust titles of the Spanish claim to the barbarian lands of the so-called Indians [*De Indis*], that possession and occupation of these lands is most defensible in terms of the laws of war.’³⁴ In other words, the doctrine of *necessitatis* is invoked within a ‘liminal’ juro-political space within which there is not merely an impotent monarch, but no monarch of any kind, Vitoria, like the other Late Scholastics, having abjured the legality of *Inter caetera*.³⁵ Within this juridically ‘empty’ landscape, *ius naturale* provided the requisite ‘presence’ of judicial legitimacy. The absence of public *auctoritas*, in turn, serves as the discursive correlate to the material realities of a frontier society; practical enforcement of an injured transcendental *ius* automatically ‘devolves’ upon the lone private person via *necessitatis*.³⁶ In this way, Vitoria pragmatically adapted neo-Thomism to the experience of Colonialism. We are permitted to say, therefore, the instauration of the Late Scholastic discourse of Just War doubles as the site of the production of the colonial difference.

There are some sins against nature which are harmful to our neighbours, such as cannibalism or euthanasia of the old and senile, which is practised in [the New World]; and

33 Francisco de Vitoria, ‘De Iure Gentium et Naturalis of St. Thomas Aquinas, Summa Theologica, Secunda Secundae, Question 57, Article 3,’ in James Brown Scott, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1934), cxi–cxxx at cxvi–ii. Emphasis added.

34 Vitoria, ‘On the Law of War,’ 295.

35 See above, Chapter Three.

36 Keen has persuasively shown that the ‘letter of marque’ was a juridical innovation of medieval frontier communities such as the Welsh or Scottish marches, which, out of the necessity of self-reliance, frequently had to ‘privatise’ their own law-enforcement operations; ‘the very word “marque” is said to be derived from “march”, from the marcher’s right to avenge his private wrongs by armed force.’ Maurice Keen, *The Laws of War in the Later Middle Ages* (London: Routledge & Kegan Paul, 1965), 231; see also *ibid.*, 226–7.

since the defence of our neighbours is the rightful concern of each us, *even for private persons and even if it involves the shedding of blood*, it is beyond doubt that any Christian prince can compel [the 'West Indians'] not to do these things. By this title alone the emperor is empowered to coerce the Caribbean Indians [*insularis*].³⁷

Ius naturale doubles as the legitimating principle of *bellum iustum* for both private and public actors within domains beyond the exercise of lawful prescription, *extra commercium*.³⁸ For both Vitoria and Grotius, the Modern World-System serves as the arche-trace within which the discursive oscillation between Humanism and Scholasticism operates; the vital discursive conduit is provided by the historical conjuncture between *bellum iustum* and Coloniality. Grotius, however, goes far beyond Vitoria in his development of 'apologetic' rhetoric, through the crucial innovation of Corporate Sovereignty; neo-Thomist discourse is restricted to a strict logical equivalence between private agency and natural person. For Grotius, the 'thin' ontology of Humanism and minimal morality invest the VOC with all of the requisite marks of sovereignty wholly independently of the positive constitutional authority of the Estates-General. Nominally, Grotius subordinates the agency of the Corporation to the public *auctoritas* of the State.

Although... this conflict could have been waged as a private war, and a just one, too, it is nonetheless more accurate to say that in actual fact it is a public war and that the prize in question was acquired in accordance with public law, the author of the conflict being, in reality, the States Assembly of Holland, now allied with the other Provinces of the Low Countries.³⁹

Consistent with his con-federalism Grotius refrains from assigning public responsibility of the war to the Estates General of the United Provinces, which are here designated as 'mere' allied states. Yet even here the logic of the dangerous supplement continues to exude its 'presence'. The Naturalist doctrine of Just War, in combination with the 'thin' ontology of minimal morality and civil society, repeatedly fragments the 'essentialist' space of public identity.

We find that Nature—the mistress and sovereign authority in this matter—withholds from no human being the right to carry on private wars; and therefore, no one will maintain that the East India Company is excluded from the exercise of that privilege, *since whatever is right for single individuals is likewise right for a number of individuals*

37 Francisco de Vitoria, 'Lecture on the Evangelization of Unbelievers', in id. *Political Writings*, 347.

38 See below, Chapter Seven.

39 Hugo Grotius, [*De Indis*] *De Iure Pradae Commentarius. Comentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (London: Wildy & Sons: 1964), 283.

*acting as a group?*⁴⁰... It was permissible for the Dutch East India Company to attack in the war the individual Portuguese who committed the crimes... Such an attack was also permissible against the state in question, that is to say, against the Portuguese people. For there is nothing to prevent a war from being private for one side, public for the other, and at the same time just for the former.⁴¹

As a result, the internal discursive logic of *De Indis* necessarily invests the corporate/private entity with the legal status of lawful combatant. 'In the natural order... every individual is charged with the execution of his own rights'⁴²... Therefore... *private wars* (for these should be dealt with first) *are justly waged by any person whatsoever, including cases in which they are waged in conjunction with allies or through the agency of subjects.*⁴³ Herein, the 'agency of subjects' is performed by the VOC; the Company's privateering campaign is a direct continuation of *bellum iustum* against the Iberians on the High Seas.⁴⁴ Accordingly, the legality of the Public War is systematically 'read down' from the Naturalist Private War.

Just as the power to wage war privately resides in the individual, so the power to wage war publicly resides primarily⁴⁵ in the state regardless of whether the subject-matter of the dispute was public from the beginning or whether it has been changed from a private into a public matter through a judicial process⁴⁶... *Public Wars are justly waged by a state or by a magistrate in accordance with his rank, both in conjunction with an allied state or allied magistrate, and through the agency of the subjects.*⁴⁷

De Indis provides four separate causes of Just War: defence of self, defence of property, collection of debts,⁴⁸ and the avenging of injuries. All *causi belli* are directly governed by Natural Law, operating in a binary manner: (i) the governance of trans-national spaces, and; (ii) the legitimisation of lawful authority of private agents within *extra commercium*.

Now, I wish to have it understood that these four causes listed as suitable subject-matter for war, *are of the same character whether the war be private or public*... In the case of public wars, however, the rights as well as the examples involved are far more clear-cut; and private wars furthermore differ from public wars with respect to their efficient

40 Ibid. 217. Emphasis added. Here, the legal personality of the Corporation is sub-textually conflated with a physical aggregation of 'natural persons'.

41 Ibid. 272.

42 Ibid. 60.

43 Ibid. 62.

44 Ibid. 283–317.

45 Note: *Not* 'exclusively'!

46 Ibid. 62.

47 Ibid. 65.

48 The internalisation of 'protection costs'; see below, this Chapter.

agents and their form. Nevertheless, they are not different in their subject matter. The examples afforded by all living creatures show that force privately exercised for the defence and safeguarding of one's own body is justly employed. Furthermore, such force is also just when the purpose is defence or recovery of one's property; nor is it less so when employed for the collection of a debt. Even private exaction of a penalty for crime is sometimes permitted; for example, when the penalty is imposed upon adulterers... robbers, rebels, or deserters... Nor is it by mere chance that the very laws expressly applying the term *ultio* ['vengeance'] to an 'indulgence' that has been granted.⁴⁹

The global enforcement of *liberum commercium* serves as the self-legitimizing basis of both private and public warfare.

[Since] a just cause of war exists when the freedom of trade is being defended against those who would obstruct it, we arrive at the conclusion that the Dutch had a just cause for war against the Portuguese... The defence or recovery of possessions due, all constitutive just causes of war. *Under the head of 'possessions,' even rights should be included...* But the concept of 'rights' embraces both that which is due us in our capacity as private individuals, and that which is our due by the law of human fellowship... that is to say, the use of whatever is common—e.g., the sea and commercial opportunities—forms a part of the said concept. *Therefore, if any person has a quasi-possession of such a right, it will be proper for him to defend that claim...* [Just] War, since it may be undertaken for the defence of possessions, may likewise and above all be undertaken to defend the use of those things which, according to natural law, should be commonly enjoyed; and therefore... those who block the routes along which necessities are transported to and from may be actively resisted, even without authorization from the ruler... This resistance is justified, moreover, by the very imposition of a prohibition [against common use of a common possession].⁵⁰

On a literal interpretation of *De Indis*, it is more accurate to say that the seizure of the *Santa Catarina* was not a 'public' act *de jure*, but a retroactive State adoption of a *de facto* 'private' action.

Accordingly, from the Portuguese standpoint, there is no doubt but that it was permissible to do what was actually done [in regard to the carack *Catharine*]. In any case, both the States General of the United Provinces and the States Assembly of Holland... were so far from condemning the action of the East India Company and its servants, that they sanctioned it not only by intervening in the apportionment of the prize but also by the bestowal of rewards and honours: *Thus, even if no order had been given, the lack of such authorization would nevertheless have been counterbalanced by the execution of a publicly advantageous enterprise, and by retroactive approval, so to speak*⁵¹...

49 Ibid. 68.

50 Ibid. 262–3. Emphasis added.

51 Ibid. 305.

Even if no order specifically concerned with the prize had been issued, nevertheless, owing to the fact that both the Admiral of the Fleet and the captains of the individual vessels had been granted jurisdiction by the state, these commanders would have been empowered—in the absence of judges⁵² and in defence of the rights of subjects as well as of their own authority—to impose punishment⁵³ upon Portuguese offenders against that authority, and to seize the property of such offenders... [As] supported by public authority... in accordance with the secondary law of nations.⁵⁴

II *De Iure Praedae: Corporate Sovereignty and Just War*

It is under-appreciated that C. XII of *De Indis*, the core of the *Mare Liberum*, is predicated upon the intrinsic legality of private warfare; the full title of the chapter is, 'Wherein it is shown that even if the war were a private war, it would be just, and the prize justly acquired by the Dutch East India Company'. In fact, Grotius excised virtually all references to private warfare and Corporate Sovereignty from the Text, restricting the rhetorical scope of *Mare Liberum* to the public domain. In contrast, the foundational premise of *De Indis* is that 'all seizures of prize and booty are just, which result from a just war,' whether seized by public or private agents.⁵⁵ Note the metaphysical inversion at work; the legality of the prize is determined by the 'justness' of the war, not by the identity of the prize-taker; 'what is known as "prize" or "booty" becomes the property of him who seizes it in a just war.'⁵⁶

There are two external textual influences at work here. The first is the dyadic *Commentarius*. Like *Mare Liberum*, the 'twin' Text is premised upon considerations of public authority and objective identity.

The right to take possession of the enemy's goods in the course of a just war (or at least to an extent not exceeding the value of the goods taken by the enemy, and the expenses of losses incurred) stems from the power to exact revenge, or rather inflict punishment, that is inherent in the state.⁵⁷

However, the logic of the dangerous supplement repeatedly undermines the demarcations between the nominally distinct domains of Public and Private. Again, a Derridean 'pun'—a textual displacement caused by a sudden realisation of the utterly fortuitous nature of all linguistic construction that blurs the operational

52 The High Seas being *res extra commercium* and therefore beyond prescription.

53 Commutative Justice.

54 Ibid. 311.

55 Ibid. 58.

56 Ibid. 113.

57 Hugo Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, ed. with Introduction by Peter Borschberg (New York: Peter Lang, 1994), 263.

'distinction between [the] surface features of the discourse and its underlying logic'⁵⁸—discursively links both Texts. Here a *double-entendre* of the meaning of the word 'prize': the *Commentarius* equates 'prize' with *libertas*, whereas *De Indis*, as a textual instrument of a Corporate Sovereign, identifies 'prize' with 'profit', the lawful acquisition of both via *bellum iustum* a 'mark of sovereignty' which may signify equally well either a public or a private agent. Furthermore, this 'pun' can only operate within a strictly Scholastic framework, hinging on the discursive identification between *ius* as 'right' with *dominium*; any breach of a right is tantamount to a form a 'theft' (*furtum*);⁵⁹ ergo, the capture of a right in the event of a Just War, which is lawful restorative and/or punitive justice, is mimetically identical to a form of prize-taking. The essence of the 'pun' is the Text's strict economy of equivalence(s) between commercial values and political imperatives—*libertas*=prize/prize=*ius/ius*=*libertas*—all operate to subvert the 'seriousness' of the Grotian discourse, that being the investiture of legal terms with metaphysical presence. Instead, all formal legal expressions are unwittingly revealed as having been surreptitiously reduced to the level of an unlimited material acquisitiveness—the 'ceaseless accumulation' of the Capitalist World-Economy; herein, 'freedom' as 'profit'.

It is beyond doubt that I may take over as much of the right belonging to my enemy [*iuris hosti*] as I possibly can, until I secure a proper recompense... In a public war, all the 'goods' belonging to one side that are taken over by the other become the property of that second party. But not even here can a distinction be drawn between 'incorporeal' and 'corporeal' goods. For it is evident that a principedom or a[n] empire may come to someone's possession through a public war; but these goods are not held by anyone as private, but only quasi-possessions, and as such may only be said to 'be captured'.⁶⁰

The master conceit operating sub-textually is the iterability between 'corporeal' and 'incorporeal' prizes that facilitates the taxonomic re-classification of both *ius* and *libertas* as *commodities*; through maximising the 'production' of plunder, the VOC simultaneously enlarges the total quanta of freedom of the Batavians.

The second exogamous Text is Vitoria's *De Iure Belli* ['On the Law of War']. Utilising Scholastic rather than Humanist discourse, Vitoria is able to undertake an extensive discussion of booty that clearly parallels the morally minimal Grotius.

58 Jonathan Culler, *On Deconstruction: The Theory and Criticism of Structuralism* (London: Routledge & Kegan Paul, 1983), 146.

59 Brett, *Liberty, Right and Nature*, 25; also at 27–8, 29 and 38.

60 Grotius, *De Indis*, 261. A less 'witty' but more materially based linkage between *libertas* and commercial profits formed a central component of republican discourse. Martin van Gelderen, 'The Machiavellian Moment and the Dutch Revolt: the Rise of Neostoicism and Dutch Republicanism', in Gisela Bock, Quentin Skinner and Maurizio Viroli (eds), *Machiavelli and Republicanism* (Cambridge: Cambridge University Press: 1990), 205–223 at 211–12.

There is no doubt that all booty taken in a just war up to the value sufficient to recompense the property unjustly seized by the enemy⁶¹, becomes the property of the captors. No proof of this conclusion is needed, since this is the very purpose of war... At least in the law of nations (*ius gentium*) all movable goods become the property of the captors, even if their value exceeds that of the compensation of losses... But the question of immovable property is more difficult... for an injury received it is also lawful to deprive the enemy of part of his land in the name of punishment, that is, in revenge and according to the scale of injury.⁶²

Even more striking, Vitoria expressly equates the compensatory function of lawful prize-taking with global governance and international public order.

Even after the victory has been won and property restored to its rightful owners, and peace and security are established, it is lawful to avenge the injury done by the enemy, and to teach the enemy a lesson by punishing them for the damage they have done. For the proof of this point it should be noted that the prince has the authority not only over his own people but also over foreigners to force them from harming others; this is his right by the law of nations and the authority of the whole world. *Indeed, it seems that he has this right by natural law: the world could not exist unless some men had the power and authority to deter the wicked by force from doing harm to the good and the innocent. Yet those things which are necessary for the governance and conservation of the world belong to natural law.*⁶³

In other words, *ius naturale* and *ius gentium primum* and *secundarium* suffice to provide the State with extraterritorial prescriptive jurisdiction.

Given that all of this is written by a Dominican mendicant, it should be fairly clear that the issue separating Vitoria from Grotius has nothing to do with private property or 'possessive individualism', but rather the purely metaphysical problem of contending identities. On the basis with which it is strategically employed within the Grotian Text, Corporate Sovereignty is simply inconceivable within any other terms other than a discursive oscillation between contending ontologies. Vitoria is discursively compelled to identify global governance with an exclusively *public* authority. For Grotius, however, the strict logic of iterability prevails; the lawful exercise of *ius* via *bellum iustum* itself constitutes the legitimate 'mark of sovereignty', while the effective exercise of the mark enables it to implement Just War.

Nor will anyone imagine that, in the present case, either the East India Company or the men who commanded the ships as representatives of the Company, were inspired by any purpose other than that of lending their services and their allegiance to the States

61 Presumably, the 'West Indians'.

62 Vitoria, 'On the Law of War', 323–4. Which, in turn, provides the basis of the lawful dispossession of Indigenous Peoples. See below, Chapter Four.

63 Ibid. 305.

General, which was in its turn desirous of providing both for public vengeance and for the rights of the Company itself... Now, we have already stated⁶⁴ that spoils taken in a public war are acquired—in a direct sense, that is to say, and *ipso iure*—for the state;⁶⁵ but we have also indicated that it is possible for such spoils to be converted, either in whole or in part, by special assignment or by a general law, into the acquisition of the very individuals through whom they first became the acquisition of the state... In short, since the entire risk and expense was the concern of that Company and the latter was not promised any reward by the State—the whole of the prize, aside from the portion especially excepted and the share due the sailors, belong to the East India Company, not only in virtue of the... Dutch statute, but also by universally accepted law.⁶⁶

The problem of the legitimization of organised private violence is therefore solved through the application of neo-Realism; *ius naturale* is both the pretext for and the justification of *bellum iustum*.

War is just for the very reason that it tends toward the attainment of rights; and in seizing prize or booty we are attaining through war that which is rightfully ours... the essential characteristic of just war consists above all in the fact that the things captured in such wars become the property of the captors... [The] seizure of spoils is agreeable to the Divine Will⁶⁷... Since we have demonstrated that the law which governs spoils, like the law of war, has its origin in a natural instinct [*habitus*] planted by God Himself ['Presence'], and since the equitable character of the act under consideration⁶⁸ is clearly apparent when viewed in the light of the principles underlying natural law and the law of nations,⁶⁹ surely the said act involves no element that should cause any one to feel shame.⁷⁰

64 Grotius, *De Indis*, 130.

65 Once again Grotius is disingenuous, suggesting a clear hierarchy between public and private interests; the factional interpenetration between the private and public bodies renders such a hierarchy non-sensical. For Klein, 'Dutch foreign policy was undisguised assistance to trade.' P.W. Klein, 'Dutch Capitalism and the European World-economy', in Maurice Aymard (ed.), *Dutch Capitalism and World Capitalism* (Cambridge: Cambridge University Press, 1982), 75–92 at 87. For Israel, Dutch 'politics and economics merged at every point'. Jonathan I. Israel, *The Dutch Republic and the Hispanic World 1606–1661* (Oxford: Oxford University Press, 1982), 435. For him, the VOC constituted 'a unique politico-commercial institution [serving as]... an arm of the Dutch state.' Jonathan I. Israel, *The Dutch Primacy in World Trade* (Oxford: Oxford University Press, 1982), 70–1.

66 Grotius, *De Indis*, 312–13.

67 Ibid. 43–4.

68 The *Santa Catarina*.

69 Here both *ius naturale* and *ius gentium* descendant metaphysical categories of a 'thick' ontological Presence.

70 Ibid. 319.

The critical link between the two primitive scholars is provided by the pivotal concept of *necessitatis*. Vitoria restricts necessity to the extra-territorial jurisdiction of the New World, *terra firma* as *terra nullius*. Grotius, more ambitiously, taxonomically re-classifies the entirety of the Oceans as *res extra commercium*, potentially denoting every single maritime dispute as a necessary recourse to private agency. Schmitt has established this point clearly.

The freedom of the seas is a problem of spatial ordering of the utmost importance in international law... In reality, it was not Roman law that broke through in the 16th century with respect to the freedom of the high seas, but something else entirely, i.e., the old, elemental fact that law and peace were originally only in force on land... The structure of European international law which emerged [during the Grotian Moment] was based on this link between two 'new' spaces [land and sea]—'free' spaces in the sense that they were not embraced by the former European order of firm land.⁷¹

As a result, both approaches, the 'thicker' Scholastic and the 'thinner' Humanist, mediate the material condition of frontier settlement and colonialist appropriation.

III *Respublica* and the Privatisation of International Authority

It is through the taxonomic re-classification of the private actor as international legal personality that Grotius most blatantly diverges from Late Scholasticism and its relatively 'thick' ontological discourse. Vitoria, as a neo-Thomist, has no difficulty in formulating a coherent doctrine of *bellum iustum* that takes full account of the economic dimensions of armed struggle.

It is certain that we may plunder them [the 'West Indians'] of the goods and property which have been used against us by the enemy. This is clear, because otherwise we cannot gain victory against them. Indeed, we may take the money of the innocent, or burn and ravage their crops or kill their livestock; all these things are necessary to weaken the enemies' resources. There can be no argument about this. From this there flows the corollary that if the state of war is permanent, it is lawful to plunder the enemy indiscriminately, both innocent and guilty, since the enemy relies upon the resources of its people to sustain an unjust war, and their strength is therefore weakened if their subjects are plundered.⁷²

The critical difference is that Grotius, through the medium of the 'thin' ontological construct of Corporate Sovereignty, is able to systematically translate these Naturalist principles into the discursive framework of *minima moralia*. Herein,

71 Carl Schmitt, 'The Land Appropriation of a New World', *Telos*, 109 (1996), 29–80 at 37.

72 Vitoria, 'On the Law of War', 317. This passage forms part of Q. 3, Art. 2, 'Whether One May Plunder Innocent People in a Just War', 317–18.

the ontological ‘thinness’ of the agent—the VOC—serves as the metaphysical correlate of a capitalist logic of ceaseless accumulation; in this case, the internalisation of protection costs.

If any private individual shall conduct a public war at his own expense, to his own loss, and at the risk of damage to his personal interests, while nevertheless employing for that enterprise the labour of other persons whom he has hired either at a fixed price or by entering into an agreement regarding a portion of the spoils which properly belong to him, the said individual will acquire immediately the goods captured from the enemy through the efforts of those hired assistants. For he has possession through the agents whom he was able to substitute for himself, to be sure, in the actual waging of the war; and cause is supplied him by the state... Therefore, in accordance with an absolutely indisputable right, *to him who wages a public war at his own expense, to his own loss, and [at the] risk [of damage to his personal interests], through the efforts of his own agents, and in the absence of any agreement regarding recompense, all the spoil so taken properly pertains, save in so far as some part thereof is excepted in consequence of a special law or agreement.*⁷³

As Vitoria cannot conceive of a lawful international private actor, he is unable to formulate a concept of self-sustaining warfare as an exercise of economic rationality; in this way, Late Scholasticism suffers from the same internal structural limitations as did the Absolutist *Estado da India*. Grotius, precisely because he has made the discursive shift towards the ‘thinner’ notion of *ius naturale* and positive *habitus*, is able to expressly correlate corporate agency with hegemonic function.

Precisely because our opponents are beginning to entertain greater hopes and are seeking even to grasp possession of those seas to which the Dutch have a special right, we should strive all the more zealously to ensure their failure in the very midst of that attempt by heaping additional expenses upon those which they have already incurred. In this connection, it is of the utmost importance that we cause as much trouble as possible for the Iberian peoples throughout the East Indies, so that they may be thrown into confusion again and again by new defeats and losses. Such a course of action is particularly advisable in view of the fact that the expenditures which it will involve for our own side, will lay no burden upon our state but will be met instead by private citizens. Besides, who knows but that success in the East Indies might presently give us confidence to undertake some bold enterprise in the American sphere? And in such an event, we surely could regard that [Iberian] domain [in the New World], built upon the spoils of all nations, as a legitimate object of despoliation by any nation!⁷⁴

73 Grotius, *De Indis*, 167.

74 Ibid. 350–1. It was precisely to enable the private subsidisation of Dutch penetration into the western hemisphere that the Dutch West Indies Company was incorporated.

The VOC as effective ‘surrogate of sovereignty’ is the locus of a perfect convergence between materialist praxis and discursive formation, both parallel operations governed by the arche-trace of the Capitalist World-Economy; the VOC is able to sustain leadership through the expeditious internalisation of protection costs, the Dutch capitalist republic as true hegemonic successor to Absolutist Iberian world-empire.

It should be understood that... prize or booty is taken not only from the goods of him who fights unjustly, but also from those of all his subjects (women and children not excepted) until complete satisfaction has been given to the just belligerent for that which is due him⁷⁵... Hence it is permissible to infer, not only that possessions may be forcibly taken from the said subjects, but also that these possessions may be added to our own. For if, on the one hand, they were snatched away from us⁷⁶ by these very subjects, whom we regard as personally under obligation to us because of their imperious conduct or for whatever reason, nothing could be more just than that we should take back by force that which could not be reclaimed in any different way; or if, on the other hand, it is a state that has wronged us or otherwise incurred a debt to us, there is even then nothing to prevent the seizure of the subject’s goods in payment, since... such goods are liable to seizure for the debt of the state.⁷⁷

IV The Politicisation of Presence: Between Apologia and Utopia

As I have already discussed in Chapter Five, Tuck’s account of the Grotian Heritage, although thoroughly persuasive on many points, nonetheless contains much to critique, especially in its tortuous relationship with the Dutch appropriation of the ‘Machiavellian Moment’. As Roelofsen has indicated,⁷⁸ Tuck’s need to acquire a full-fledged historical proto-type for Hobbes—thereby situating the ‘Hobbesian Tradition’ within a pre-existent and continuous body of political/philosophical discourse—may have led him to underestimate the degree of Grotius’ continuity with Late Scholasticism as the dominant pole of *difference*.⁷⁹ What Tuck inter-

75 That is, for the lawful forcible collection of debt, as one of the four just causes of war.

76 It is not clear from the context whether the first person plural here refers to Holland, the United Provinces, the Dutch people, or the VOC.

77 Ibid. 113 and 112.

78 C.G. Roelofsen, ‘Grotius and the “Grotian Heritage” in International Law and International Relations; the Quatercentary and its Aftermath (circa 1980–1990),’ *Grotiana*, NS 11 (1990), 6–28 at 20.

79 ‘The transition from Gentili to Hobbes was straightforward: it merely needed the extraordinary idea of Hugo Grotius, that there was no reason why an individual should not be thought of as morally identical to a state.’ Richard Tuck, *The Rights of War and Peace: Political Thought and International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999), 228. See also: Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press,

pretends as a Grotian 'singularity' I would prefer to regard as a discursive oscillation between rival poles of ascending and descending hierarchies. The issue of Grotius' originality depends far less upon the assumption of his formulation of a new tradition than his self-reflexive rhetorical manoeuvrings between two established traditions. I shall be primarily concerned with the issue of the precise relationship between *De Indis* and neo-Thomism, this having been identified by Kennedy as the meta-discursive framework of Primitive Legal Scholarship. The question now becomes: after Tuck, can *De Indis* still be persuasively regarded as existing within the *continuity* of the 'primitive' tradition?⁸⁰

It is useful to recall Koskenniemi when considering the deeper political imperatives of the contemporary academic practice in elevating Hobbes to the level of progenitor of a uniquely 'Modern' form of legal and political discourse.

However much later liberals may have disliked Hobbes' substantive conclusions or his political realism, the one thing that unites them with Hobbes is their criticism of relying upon natural principles to justify political authority. Appealing to principles which would pre-exist man and be discoverable only through faith or *recta ratio* was to appeal to abstract and unverifiable maximums which only camouflaged the subjective preferences of the speaker. It was premised on utopian ideals which were constantly used as apologies for tyranny.⁸¹

One possible way of critiquing Tuck's approach is to criticise him for attempting to interpret *De Indis* as a foundational text of an innovative secularised political philosophy. To the extent that Tuck regards the Text as foundational he must necessarily 'essentialise' both authorial intent, and, by extension, authorial *presence* within the text, both highly suspect moves from the perspectives of Deconstruction. Whereas Tuck must re-present Grotian 'eclecticism' as a sign of originality, a Derridean approach would treat the multiplicity of authority within *De Indis* as an endless textual 'play' of signifiers and subversion, intentional or otherwise. The application of the Deconstruction approach would have two immediate practi-

1979), 58–81 and Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), 154–201. Contrast this with Roelofsen: 'The key to our reading of Grotius is his conservatism.' C.G. Roelofsen, 'Grotius and State Practice of His Day', *Grotiana*, NS 10 (1989), 3–46 at 16.

- 80 Concerns similar to Tuck's have been raised by Hervada, particularly in relation to the 'impious hypothesis' expressed in *De Iure Belli ac Pacis*: Grotius is

a qualified representative of juridical Humanism... [whose] novelty resides in that [he] does not establish any relation of causal exemplarity—analogy and participation—between divine nature and human nature, between God's reason and man's [*analogia etis*]... Once the principle of exemplarity and analogy is broken, no nexus of ontological necessity between God and human nature is established.

Javier Hervada, 'The Old and the New in the Hypothesis *Etiam daremus*', *Grotiana*, NS 4 (1983), 3–20 at 7 and 18–19.

- 81 Martti Koskenniemi, 'The Politics of International Law', *European Journal of International Law*, 11/1 (1990), 4–32 at 5.

cal consequences for textual interpretation: (i) it would re-assert the iterability between the antinomies of Humanism and Scholasticism, which Tuck has tried to minimise through his 'originality'/discontinuity thesis; and (ii) it would tend to favour Kennedy's original argument concerning Primitive Legal Scholarship, illustrating that at least *some* of the apparent moments of 'singularity' within *De Indis* are in fact either consistent with or the direct continuation of neo-Thomistic concerns—many of the alleged innovations of the Grotian Heritage bear the traces of the Late Scholastic tradition, textually juxtaposed against intermittent strategic shifts towards Humanism.

This is readily apparent with the issue of Grotius' alleged 'un-theism', the necessary theological precondition to the minimal moral universe. It is illustrative to critically contrast Tuck's interpretation with the CLS-based insights of Kennedy. For Critical Legal Theory, Grotius' significance lies far more with his juridical methodology rather than with the substantive content of doctrinal exposition. A critical reading of *De Indis* indicates a myriad of ways in which Grotius clearly dwells within the discursive trace of Late Scholasticism. In fact, the discursive stratagems ultimately serve to complement each other; the more that we query Grotius' Tacitean minimalism, the greater the degree of discursive continuity with the Late Scholastic tradition.

First of all, examination must be made of Grotius' own professed anti-sectarianism. Anyone sensitive to the delicate constitutional balance of the United Provinces and possessing a vested interest in the maintenance of the smooth functioning of the political establishment—which Grotius, in his dual capacity as VOC lawyer and as Advocate-Fiscal of the Republic clearly did—would always seek to textually/discursively deploy the concept of Providence in the 'weakest' ontological sense possible;⁸² which is to say, in the politically least offensive way possible.⁸³ Secondly, there is the seemingly intractable problem of Grotius' own subjective confessional allegiances. Unsubstantiated rumours of a secret conversion to Catholicism notwithstanding, it appears most likely that

82 Van Gelderen is adamant on precisely this point:

Dutch political thinkers emphasized that freedom of conscience was of paramount importance, forming the essence of liberty... [they] urged for religious toleration on political grounds. In the spirit of Renaissance political philosophy, they argued that concord was the foundation of *res publica*. Its main internal threat, faction, was in the Low Countries above all, caused by religious diversity. The solution was not to suppress this form of faction, and thus to persecute heretics, but to control it with a policy of religious toleration.

Gelderen, *The Political Thought of the Dutch Revolt 1555–1590*, 261–2.

83 See Israel, *The Dutch Republic and the Hispanic World*, 439–40, on Grotius' personal attempts to heal the growing sectarian disputes within the United Provinces following the implementation of the Twelve Year Truce, culminating in the publication of the *Ordinem pietas* in 1613.

At the heart of [Grotius'] Christian republican ideology was his harnessing humanist scholarship to a campaign to convince the public that the States of Holland, and public Church, as upheld by the States, adhered fully to Christian truth while, simultaneously,

Grotius was a committed Irredentist.⁸⁴ If so, he would have laboured under no compunction in adapting and utilising a multiplicity of divergent and, perhaps, logically incommensurable authorities and sources; ecumenicalism served as the discursive basis of the theo-political restoration of the 'lines of amity' within the emergent core zone of western Europe. In an uncharacteristically frank declaration shortly before his death, Grotius declared

I have always loved peace, and I still love peace... But in order to achieve it, first peace between the Christian states is required, and thereafter in the church, which Christ desired to be one... Those who seek to further peace among Christians, are obliged to destroy those dogmas which disturb political peace. *It is better to be a good citizen than a good Christian.*⁸⁵

But even here 'authorial presence' proves elusive. Grotius *appears* to represent himself a loyal disciple of the secularist Lipsius in calling for the civic subordination of Church to State;⁸⁶ yet it remains just as possible that Grotius was attracted to Lipsianism because of its anti-sectarian potential for ecumenical reconciliation.⁸⁷

rejecting precision intolerance, maintaining a broad, but also legitimate, toleration of disparate doctrines among its preachers.

Ibid. 440. See Tuck, *Philosophy and Government 1572–1651*, 179–90.

84 G.H.M. Postomus Meyjes, 'Hugo Grotius as an Irenicist', in R. Feenstra (ed.), *The World of Hugo Grotius (1583–1645)* (Amsterdam: APA-Holland University Press, 1984), 43–63, *passim*; Leonard Besselink, 'The Impious Hypothesis Revisited', *Grotiana*, NS 9 (1988), 3–63 at 25–33.

85 Postomus Meyjes, 'Hugo Grotius as an Irenicist', 62–3. Emphasis added.

86 Hans W. Blom, *Causality and Morality in Politics: The Rise of Naturalism in Dutch Seventeenth-Century Political Thought* (Rotterdam: CIP-Gegevens Koninklijke Bibliotheek, 1995), 188:

The stability of the state, as far as that can be realised, was the central point of reference for [Lipsius]. The subjects have to accept their hardship if it must be, the rulers have to care for unity and concord... As for religion, Lipsius believed that the power of the state depends on religious peace, to be had only if there is but one religion and only if that religion is subjected to the jurisdiction of the prince.

See Tuck, *Philosophy and Government 1572–1651*, 179–90.

87 Israel has implicitly suggested as much in his discussion of Grotius' efforts to establish a new form of biblical exegesis derived from 'Rationalist' principles.

Some key features of the new Bible criticism [of the mid-17th century], such as the search to establish linguistic meanings and usages by a close comparison of passages, and exploring historical context, were in fact pioneered earlier by Grotius, who believed the reconciliation of the Christian Churches could only come about when Scripture is no longer used as an armoury for polemical warfare by one confession against the other, but understood as an expression of the thought world of the ancient Israelites and early Christians. During the early Enlightenment, Grotius was indeed not infrequently considered the greatest exegetical innovator who initiated the process which culminated in Spinoza... Nevertheless, for Grotius too the Bible remained divine Rev-

Thirdly, Grotius' notorious 'eclecticism'⁸⁸ that Haggemacher has famously denoted as a 'universe of texts'⁸⁹ itself thwarts any attempt at arriving at a conclusion of Grotius' actual beliefs with any degree of reasonable certainty.⁹⁰ Instead of reasoning *a priori*, which is what we should expect if Tuck's thoughts concerning 'Mathematics' are correct, we witness instead Grotius evidencing an almost obsessive *a posteriori* approach, 'proving natural law principles by demonstrating that they correspond with divine commands, opinions of classical writers and generally accepted customs.'⁹¹ The *leges* of C. II of *De Indis* are 'proven' *exclusively through inductive rather than deductive reasoning*.

The true way, then, has been prepared for us by those jurists of antiquity whose names we revere, and who repeatedly refer to the art of civil government back to the very fount of nature... Accordingly, we must concern ourselves primarily with the establishment of their natural derivation. Nevertheless, it will be of no slight value as a confirmation of our belief, if this conviction already formed by us on the basis of natural reason is sanctioned by divine authority, or if we find that this same conviction were approved in earlier times by men of wisdom and by nations of the highest repute.⁹²

elation and there is still a considerable gap between his rationalistic methodology, leaving space for Providence, Christ, and the miraculous, and Spinoza's, which does not.

Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650–1750* (Oxford: Oxford University Press, 2001), 447–9 and 452–4.

- 88 The plethora of quotations come from two main sources, ecclesiastical—including the *Corpus Iuris Canonici* (Gratian and the Decretalists), and Zilletti's *Oceanus iuris*—and civil, primarily Justinian's *Corpus Iuris Civilis*. See Ludwik Ehrlich, 'The Development of International Law as a Science', *Recueil des Cours*, 105 (1972), 172–265 at 210–11.
- 89 P. Haggemacher, 'On Assessing the Grotian Heritage', in T.M.C. Asser Institut (ed.), *International Law and the Grotian Heritage* (The Hague: T.M.C. Asser Instituut, 1985), 150–60, *passim*.
- 90 This is admirably argued by Nabusi, particularly in relation to Grotius' development of Just War theory in *De Iure Belli ac Pacis*; see Chapter Five in Nabusi, *Traditions of War*, 128–176, *passim*; the discursive and rhetorical power of the Grotian tradition of Just War ultimately flows from 'its internal characteristics as a system of thought: flexibility, elasticity, and adaptability are its defining qualities.' *Ibid.* 128.
- 91 B.P. Vermeulen and G.A. van der Wal, 'Grotius, Aquinas and Hobbes: Grotian Natural Law Between *Lex Aeterna* and Natural Rights', *Grotiana*, NS 16–17 (1995–96), 58–84 at 74. See Tadashi Tanaka, 'Grotius' Method: With Special Reference to Prolegomena', in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 13 n. 13; Tadashi Tanaka, 'Grotius' Concept of Law', in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 32–56, *passim*; C.G. Roelofsen, 'Some Remarks on the "Sources" of the Grotian System of International Law', *Netherlands International Law Review*, 30 (1983), 73–80, *passim*.
- 92 Grotius, *De Indis*, 7. 'It seems evident that this kind of reasoning has nothing to do with *a priori* reasoning, has nothing in common with Descartes' methodical doubt of

It is only *after* the 'establishment of natural derivation' has been made that the text makes its signature move towards mathematical analogy;⁹³ in other words, Mathematics is 'read down' from Scripture.⁹⁴

It is most important that we never lose sight of the high degree of self-reflexivity within the Grotian Text. As I have already shown at the beginning of this chapter, the plurality of sources and rhetorical stratagems deployed is fully commensurate with the juridical landscape being assayed, in this instance the primitive international order of the early Modern World-System. Concomitantly, the rhetorical oscillations traced within the Text are equally grounded in both of the contending discursive formations, Civic Humanism and Late Scholasticism. *De Indis* may be interpreted as constituting a vast self-reflexive exercise as the Author self-consciously grounds his Text upon Rhetoric and Oratory.⁹⁵ Conversely, Late Scholasticism serves as an equally viable tool for *écriture* due to its concern with synthesis and heterogeneity; this is signified by both of the master-signs of Scholastic discourse, the *collectio*.⁹⁶ Scholastic methodology, in turn, signifies

the resolute-compositive method.' Vermeulen and van der Wal, 'Grotius, Aquinas and Hobbes: Grotian Natural Law Between *Lex Aeterna* and Natural Rights', 75.

- 93 Tanaka makes a similar point when discussing *De Iure Belli ac Pacis*:

There are two ways to prove that something is in accordance with natural law, by proof a priori or a posteriori. Proof a priori consists in demonstrating the inevitable concordance of a rule with the rational and social nature of man; proof a posteriori in concluding that it is in accordance with natural law as understood by all nations, or by all nations advanced in civilization. The latter [method] is less exact and certain than the former, but has sufficient probability, because a universal effect demands a universal cause, and the cause of such universal opinion can only be the common sense of man (*sensus communis*). The great number of quotations in JBP suggests that Grotius relies mainly on this method of proof. This makes it possible for Grotius to develop his theory of natural law in a specific and detailed manner. But the question arises how to distinguish between a proof a posteriori of natural law and proof of the law of nations based on the common testimony of many writers.

Tanaka, 'Grotius' Concept of Law', 41–2.

- 94 Tuck's emphasis upon Mathematics and Scepticism has been roundly criticised by Zagorin:

The subject of Mathematics [in *De Indis*]... after the brief reference in the first chapter, is left behind and not mentioned again; nor does [Grotius'] subsequent discussion resemble mathematical reasoning in proceeding from axioms to demonstrations. Mathematics thus served Grotius... merely as a verbal flourish or convenient figure of speech for the general principles he intended to propound.

Perez Zagorin, 'Hobbes Without Grotius', *History of Political Thought*, 31/1 (2000), 16–40 at 22; see *ibid.* 18–23 and 24–30.

- 95 See above, Introduction.

- 96 Philip W. Rosemann, *Understanding Scholastic Thought With Foucault* (London: Macmillan Press, 1999), 92–3:

As fallen humans do not enjoy divine omniscience, nor even the beatific vision granted to angels, the truth, as opposed to partial truth, is accessible to them only as a goal of a *collectio*—a painstaking gathering together of such scraps of truth as individual re-

the Thomistic theology of neo-Platonic neo-Realism: heterogeneity is the master-sign of both the form and substance of Scholasticism.⁹⁷ The sheer density of encyclopaedic reproduction of authority, a signature trait of Scholasticism in general and of Primitive Legal Scholarship in particular, renders the entire issue of ‘historical reconstruction’ of *De Indis* as a *summa collectio*⁹⁸ practically impossible, if not wholly irrelevant. The interminable ambivalence of ‘Authorial Presence’ within the Grotian Text even suggests a quintessentially capitalistic logic of inter-textual appropriation; the fluidity of commodity circulation/exchange receives its natural expression through unrestrained—and inherently indeterminable—*difference*. The radical density of authoritative citation within *De Indis* creates an almost ‘critical mass’-like effect of inter-textuality, threatening to collapse the yearned for singularity of meaning into endlessly iterable chaos. As Roelofsen has perceptively remarked: ‘it is the combination of a well-hidden “positivism” with an emphatically proclaimed naturalism that is rather baffling to the modern readers’;⁹⁹ or, in the alternative, a ‘chaotic’ oscillation between Apology and Utopia. *In terms of Deconstruction, ‘Grotius-as-Author’ is nothing more than this recurrent oscillation.*

At this juncture it is useful to recollect van Ittersum’s point that the *Prolegomena*, a Graft that is marked near exclusive reliance upon Late Scholasticism, was the final portion of *De Indis* to be composed.¹⁰⁰ If van Ittersum is correct about the sequence of authorial composition, then it appears as though the *Prolegomena* was self-consciously authored as a superimposition of an exclusively descending mode of argumentation upon an otherwise sprawling Text in a final effort to invest the manuscript with a minimal degree of thematic unity. This is best evidenced through the graft’s invocation of Mathematics. Whereas the staunchly Humanist

searchers have discovered throughout the course of history. The hope which animates this *collectio* is that the sum of these pieces of knowledge will ‘collectively’ bring us closer to the whole of the truth. Put differently, the truth can only be attained through an unflagging effort aiming at the unification of partial perspectives, each of which captures *something* of the truth while none of them can capture the truth *as such*.

97 Ibid. 133–58.

98 Discussing the later *De Iure Belli ac Pacis*, Zuckert has drawn a highly suggestive analogy between this Text and Aquinas’ *Summa Theologiae*:

The comparison [of Grotius with] Thomas Aquinas seems especially apt, for Grotius fulfilled a function in his day somewhat akin to what Thomas had done three and a half centuries earlier... Grotius paralleled the achievement of Thomas, in that he developed a Protestant version of the law of nature—a doctrine that had been developed by ‘popish’ writers and, even in the seventeenth century, remained mostly the property of counter-Reformation thinkers like Francisco Suarez and Roberto Bellarmine.

Zuckert, *Natural Rights and the New Republicanism*, 119.

99 Roelofsen, ‘Some Remarks on the “Sources” of the Grotian System of International Law’, 79.

100 See above, Introduction.

Gentili expressly repudiates the applicability of Mathematics to social affairs,¹⁰¹ for Grotius

[I]t is expedient for our purposes to order the discussion as follows: first, let us see what is true universally and as a general proposition; then, let us gradually narrow this generalization, adapting it to the special nature of the case under examination. Just as the mathematicians customarily prefix to any concrete demonstration a preliminary statement of certain broad axioms on which all persons are easily agreed, in order that there may be some fixed point from which to trace the proof of what follows, so shall we point out certain rules and laws of the most general nature, presenting them as preliminary assumptions which need to be recalled rather than learned for the first time, with the purpose of laying a foundation upon which our other conclusions may safely rest.¹⁰²

This approach is re-iterated in the *Prolegomena*: 'The Universe is ordered in consonance with... justice by God Himself, called by Plato 'the Geometer', precisely because he administers law and equity according to a certain principle of proportion... for the end sought by the geometrician is the reduction of all things to equality.'¹⁰³

101 Alberico Gentili, *De Iure Belli Libri Tres*, with Introduction by Coleman Phillipson (New York: Oceana Publications, 1964), 11:

I shall not give you demonstrations as you may get from a mathematician, but the persuasive arguments which this kind of treatise allows. For as Aristotle writes at the beginning of the *Ethics*, 'It is the part of the philosopher to seek an exact explanation in each case, so far as the nature of the subject permits itself.'

The reliance upon Aristotle at this juncture is classic Humanism. One should also contrast Grotius to Gentili at *ibid.* 10: the precepts of natural reason/*recta ratio* 'are so well known, that if you should try to prove them, you would render them obscure. At any rate, it would be useless to prove what is already manifest.'

102 Grotius, *De Indis*, 7. Tuck, correctly, sees this innovation as another instance of a wider Grotian rhetorical stratagem of tactically alternating between Humanist and Late Scholastic discourses.

By making mathematics the model for a human science Grotius made the most decisive break possible with humanism... [A] denial of the idea that there could be a science of morality comparable to mathematics or the physical sciences, and based on a set of natural laws, had been one of the starting points for the humanist movement, and it had been reinforced by the development of a new, Tacitist humanism in the late sixteenth century. Seen in its context, Grotius' move was astonishing and dramatic. But if we compare the argument of *De Indis* with that of contemporary anti-Humanists, those writers who still believed in a science of natural law, such as... the Iberian scholastics... *then we see that Grotius had not simply switched from one existing intellectual camp to another.* Instead, he sought quit explicitly to render in terms of natural law some of the main insights of the modern humanists, and to answer the sceptic not with some countervailing dogma, but by the manipulation of the sceptic's own beliefs.

Tuck, *Philosophy and Government 1572–1651*, 171–2. Emphasis added.

103 Grotius, *De Indis*, 14–15.

Geometry, in turn, signifies the ‘thick’ ontological discourse of the *Prolegomena* in two ways. Firstly, positive customary law (*ius gentium secundarium*) is thoroughly subordinated to Natural Law (*ius gentium primum*), now, quite remarkably for a ‘Humanist’, identified with *lex aeterna* by Rule I.

Where should we begin if not at the very beginning? Accordingly, let us give first place and pre-eminent authority to the following rule: *What God has shown to be his will, that is law*. This axiom points directly to the cause of law, and is rightly laid down as a primary principle.¹⁰⁴

This constitutes a manoeuvre that exactly parallels that of the Iberian Late Scholastic Francisco Suarez in his *De legibus Tractatus*; ‘Natural Law... is contained primarily in the eternal law and secondarily in the judicial faculty... the natural law is truly and properly divine law, of which God is the Author.’¹⁰⁵ As the recent pioneering work by Borschberg and van Ittersum on the watermarks of the original manuscript copy of *De Indis* indicate, Grotius may have been working on *De Indis* as late as 1613;¹⁰⁶ as *De legibus* was published in 1612, it is just possible that Suarez could have served as a direct source for Grotius. In any event, the internal logic of *De Indis* demands a shift to ‘thick’ ontology at precisely this juncture. Secondly, the two variants of *ius naturale* are textually situated within the contours of a ‘primitive’ World-System, itself normatively grounded upon a strong Naturalism. This occurs within the Text’s discussion of the ontological status of the Treaty, or ‘Compact’, under Rule III, ‘*What each individual has indicated to be his will, that is law with respect to him*’ (i.e. *ius gentium secundarium*).¹⁰⁷

When it came to pass... that many persons (such is the evil growing out of the corrupt nature of some men!) either failed to meet their obligations or even assailed the fortunes and the very lives of others for the most part without suffering punishment... there arose the need for a new remedy, lest the laws of human society be cast aside as invalid. This need was especially urgent in view of the increasing number of human beings, swollen to such a multitude that men were scattered about with vast distances separat-

104 Ibid. 8.

105 Francisco Suarez, ‘A Treatise on Laws and God the Lawgiver’, in *Selections From the Three Works of Francisco Suarez, S.J. Volume Two: The Translation*, trans. Gladwys L. Williams et al. with Introduction by James Brown Scott (New York: Oceana Publications, 1962), 3–646 at 191 and 198. See Stumpf, *The Grotian Theology of International Law*, 30–6, for a discussion of both Suarez and Grotius as drawing upon the ontologically ‘thick’ Christian, or Providential, variant of *ius naturale*.

106 Peter Borschberg and Martina Julia van Ittersum, ‘Profit and Principle? Hugo Grotius, the VOC, and the Estado da India: the Historical Context of *De Jure Praedae*’, conference paper, ‘Piracy, Property, and Punishment: Hugo Grotius and *De iure praedae*’, NIAS Conference, June 9–11, 2005, Wassenaar, The Netherlands.

107 For the Naturalist basis of Grotius’ treatment of the self-validating compact, or ‘promise’, see Zuckert, *Natural Rights and the New Republicanism*, 146–8.

ing them and were being deprived of opportunities for mutual benefaction. Therefore, the lesser social units began to gather individuals together into one locality, not with the intention of abolishing the society which links all men as a whole, but rather in order to fortify that universal society by a more dependable means of protection, and at the same time, with the purpose of bringing together under a more convenient arrangement the numerous different products of many persons' labour which are required for the uses of human life. For it is a fact... that when universal goods are separately distributed, each man's ills pertain to him individually, whereas, when those goods are brought together and intermingled, individual ills cease to be the concern of any one person and the goods of all pertain to all.¹⁰⁸

At this 'incision' can be discerned an alternate 'originary' ground of what evolved into the Grotian Heritage as identified by Lauterpacht: the subjection of the totality of international relations to the rule of law; the acceptance of the Law of Nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of States and Individuals; the rejection of 'reason of State' [i.e. anti-Machiavellianism]; the distinction between just and unjust wars; the doctrine of qualified neutrality; the binding force of promises; the fundamental rights and freedoms of the individual; the idea of peace; and the tradition of idealism and progress.¹⁰⁹ This identification of an international community of *republican* States with a deep (determinative?) 'normative holism' is precisely what Kennedy takes as the master sign of Primitive Legal Scholarship.

The primitives do not distinguish municipal law from international law, nor the law which binds sovereigns in their relations with their citizens. The primitive text envisions a single law which binds sovereigns and citizens alike. Propositions of civil law about self-defence are easily transposed into discussions of inter-sovereign relations. Both are governed by the same moral-legal order. Although the primitive may suggest that sovereigns and citizens are bound by different rules... he generally does not differentiate between two spheres of legal competence and activity... Such differences as exist seem to flow from differing capacities within a unified moral-legal system.¹¹⁰

Both Grotius' logic and rhetoric at this juncture replicate those of Althusius, grounded upon a dual appeal to alternating ascending and descending argumentation.

¹⁰⁸ Grotius, *De Indis*, 19.

¹⁰⁹ Hersch Lauterpacht, 'The Grotian Tradition in International Law', in Elihu Lauterpacht (ed.), *The Law of Peace* (vol. ii of *International Law: Being the Collected Papers of Hersch Lauterpacht*) (Cambridge: Cambridge University Press, 1975), 307–65, *passim*. See above, Chapter One.

¹¹⁰ David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27/1 (1986), 1–98 at 7–8.

In this matter, too, as in every other, human diligence has imitated nature, which has ensured the preservation of the universe by a species of covenant binding upon all of its parts. Accordingly, the smaller social unit formed by the general agreement for the sake of the common good—in other words, this considerable group sufficing for self-protection through mutual aid, and for equal acquisition of the necessities of life—is called a commonwealth [*Respublica*]; and the individuals making up the commonwealth are called citizens [*cives*].¹¹¹

The clear Humanist implications of this ‘Althusian graft’ are then ‘deleted’ by an immediate rhetorical shift back towards the Scholastic version of *ius gentium primum*—an implicit re-iteration of Rule I.

This system of organization has its origin in God the King, who rules the whole universe and to whom, indeed... nothing achieved on earth is more acceptable than those associations and assemblies of men which are known as states [*civitates*]. According to Cicero, Jupiter himself sanctioned the following precept, or law: All things salutary to the commonwealth are to be regarded as legitimate and just.¹¹²

The Author’s commitment to Republicanism, however, compels a partial shift towards *ius gentium secundarium*.

In addition to the common opinion of mankind, another factor has played its part: the will of individuals, manifested either in the formal acceptance of pacts, as was originally the case, or in tacit indication of consent, as in later times, when each individual attached himself to the body of the commonwealth that had already been established. For a commonwealth, even though it is composed of different parts, constitutes by virtue of its underlying purpose a unified and permanent body, and therefore the commonwealth as a whole should be regarded as subject to a single law.¹¹³

Rule III of the *Prolegomena* is, therefore, of the greatest possible importance for any discourse ‘Concerning the Indies.’ The oscillation between the dyadic ‘poles’ of Humanism and Scholasticism finally yields the longed-for outcome: the unconditional condemnation of violators of compacts.

There is agreement on this point, moreover, amongst almost all peoples, for in every part of the world we find a division into just such united groups, with the result that persons who hold themselves aloof from this established practice seem hardly worthy to be called human beings. Thus one might almost say that the ultimate infamy is the condition described in the words... ‘a lawless man, without tribe or hearth.’¹¹⁴

111 Grotius, *De Indis*, 19–20.

112 Ibid. 20.

113 Ibid.

114 Ibid.

To summarise: an ontologically ‘thin’ *ius gentium secundarium* is to be ‘read down’ from an ontologically ‘thick’ *lex aeterna*, this as a means of classifying *bellum iustum* as a ‘strong’ positive right. Simultaneously, this ‘right’ serves as the sovereign sign of the ontologically ‘thin’ Original Personalities of both the United Provinces and the VOC; paradoxically, *Providence wills a minimal civil society*.¹¹⁵ (Employing the language of Deconstruction, we would say that ontologically ‘thin’ Society is suffused by Presence.) Grotian ‘un’-theism—or, more prosaically, ‘secularism’¹¹⁶—is, therefore, best understood as systemic anti-sectarianism, ‘God’ being deployed tactically throughout *De Indis* in an iterable fashion between contending apologetic/thin and utopian/thick impulses. The Text’s ‘theo-ontology’ expresses a rhetorical move between Late Scholasticism and Civic Humanism, the discursive correlative of the hegemonic transition from Portugal as the ‘failed’ territorialist world-empire towards the United Provinces as the successor ‘true’ capitalist hegemon. If this interpretation is correct, then it follows that the first truly systematic ‘post-theistic’/secular international legal Scholar is not Grotius, but Samuel Pufendorf, identified by Kennedy as the key transitional figure from Primitive to Traditional Legal Scholarship.¹¹⁷ The progressive ‘thinning’ of ontology following the Grotian Moment,¹¹⁸ culminating in the wholesale shift from ‘theo-ontology’ to an ‘un-theistic’ Ontology—the discursive collapse of ‘God’ into

115 Stumpf has made an argument on this point that is highly similar to mine.

Despite the importance which Grotius accords to consensus of the legal subjects in identifying principles of Natural Right on the epistemological level, which might indeed ultimately result in a somewhat minimalist code of principles, his greater emphasis is on the reason inherent in God’s creation on the ontological level: this is certainly far from any moral minimalism whatsoever.

Stumpf, *The Grotian Theology of International Law*, 15–16.

116 Yasuaki Onuma, ‘Introduction,’ in id. (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 1–10, *passim*.

117 Tuck, *The Rights of War and Peace*, 231–2. ‘Pufendorf sought to construct a logical theory of natural law by means of a mathematical method far more systematic than anything Grotius attempted. In doing so he pushed custom and practice into the world of history, removing them from his theory of law.’ Tanaka, ‘Grotius’ Method,’ 25 n. 67. See Otto von Gierke, *Natural Law and the Theory of Society 1500 to 1800, With a Lecture on the Ideas of Natural Law and Humanity by Ernest Troeltsch*, trans. with Introduction by Ernest Baker (Cambridge: Cambridge University Press, 1958), 99.

The appeal to Divine Authority in order to secure a legal validity for the law of Nature resulted in little more than the provision of a formal basis for it; and those who never introduced the name of God at all [e.g. Pufendorf] were able to secure the same result almost equally well [by contenting themselves with human reason as the formal basis of natural law].

See also M.B. Crowe, ‘The “Impious Hypothesis”: A Paradox in Hugo Grotius?’, *Tijdschrift voor Filosofie*, 38 (1976), 379–410 at 406–7.

118 In Zuckert’s idiosyncratic but compelling language, this constituted a ‘reverse-Hegelian’ process of the negation or ‘extreme diminution’ of Aristotelianism. Zuckert, *Natural Rights and the New Republicanism*, 149. I believe that I am making a point similar to Zuckert but expressed in Derridean terms.

Nature—was only finalised in the second half of the 17th century, with the successful consolidation of the Modern World-System and the emergence of the ‘strong’ Absolutist State.¹¹⁹

V Utopia: *Ius Naturale* and Conciliarism

Perhaps the most telling consideration here is the fact that, in many ways, *De Indis* may be read as a Conciliarist Text; the frequent invocation of Voluntarism would indicate as much. As discussed in Chapter Three, Conciliarism represented the European world system’s first attempt to achieve a cognisable form of constitutional governance based upon the repudiation of *plenitudo potestatis*. What is less commonly appreciated is that the discursive shift towards a heterogenous neo-Realism took place within the confines of yet another site of colonial difference: the Teutonic crusades along the eastern frontiers of Christendom. The anti-papal arguments submitted to the Council of Constance (1414–18) by the Polish jurist Paulus Vladimiri have a direct bearing upon *De Indis*. Protesting the illegality of the Papal donation conferred upon the Order of Teutonic Knights, then waging a Crusade along the Elbe-Saale frontier,¹²⁰ and anticipating arguments that would later be made by Vitoria against the *Inter caetera*,¹²¹ Vladimiri argued that: (i) the Pope lacked the indirect power *in temporalis* to lawfully convey Infidel lands,¹²² and (ii) *ius naturale*, which governed both Christians and Infidels, served as an objective limitation to papal prescription, both *iurisdictio* and *dominium*.¹²³ As

119 Which largely accounts for Grotius’ shift towards a less migratory and systemically ‘thinner’ ontology in *De Iure Belli ac Pacis*. See *ibid.* 134–49.

120 Friedrich Lotter, ‘The Crusading Idea and the Conquest of the Region East of the Elbe’, in Robert Bartlett and Angus Mackay (eds), *Medieval Frontier Societies* (Oxford: Clarendon Press, 1989), 267–306, *passim*.

121 See above, Chapter Three and below, Chapter Eight.

122 Stanislaus F. Belch, *Paulus Vladimiri and His Doctrine Concerning Law and Politics, Volume One* (The Hague: Mouton, 1965), 341–66.

123 *Ibid.* 392–424.

What Vladimiri wanted to obtain from the Council in regard to ‘iuris interpretatio’ of the papal decrees in matters of donation of territories was, first, that the pope might not make such donation without sufficient and legitimate reason; second, that as the only legitimate reason was a crime committed by the infidels against the natural law, this misdemeanour should be proved by judicial investigation, and, third, that the pope should not act according to one-sided information by a party interested in the case, but should give the infidel party a chance to defend its case.

Ibid. 355. The final act was itself a breach of natural law, *sine debitu cognitione causae*. The problem here was the inevitable sub-textual conflation of ‘Christianising’ with ‘civilising’. See James Muldoon, ‘The Remonstrance of the Irish Princes and the Canon Law Tradition of the Just War’, *American Journal of Legal History*, 22 (1978), 309–25, *passim*; James Muldoon, ‘The Indian as Irishman’, *Essex Institute Historical Collections*, 11 (1975), 267–89, *passim*; Walter Ullman, *Law and Jurisdiction in the Middle Ages*, ed. George Garnett (London: Variorum Reprints, 1988), 371–87. ‘Being

with Grotius, it is Naturalism that thwarts the successful imposition of *monarchia universalis, ius naturale* underpinning the legal framework of Colonialism.

Although *De Indis* does not expressly cite Vladimiri or his submissions to the Council, the Text does recapitulate the basic premises of Conciliarist opposition to papal monarchy.

If the absence or negligence of the prince makes it permissible for inferior magistrates to undertake a war, how much more surely is this permissible when the prince himself does the state an injury that can be checked only by resort to arms? Not only those theologians who regard the Pope subject to the Council but even the members of the opposite faction, which sets the papal authority above that of the Council, concede (despite the latter doctrine) that in cases where the Pope is following a course destructive to the Church, the Council may be invoked in defiance of his will; and that, by the authority of the said Council, he may be [lawfully] resisted and the execution of his commands impeded, even forcibly, should such an action prove necessary. *Now, what is the Council other than an ecclesiastical States Assembly? And what is a States Assembly other than a civic council?* Indeed, on the basis of this analogy, even greater license should be conceded to the political assembly for opposing the prince than to the Council for opposing the Pope, since the very persons who declare that the Pope has received his power directly from Christ and not from the Church, nevertheless admit that the prince possesses no authority save that derived from the state.¹²⁴

This passage appears to be an elaboration of a similar argument put forward in Art.50 of the *Commentarius*.

The only objection that can be made to the law granting the right to assembly is the one now at issue: whereas the law which forbids assembly may evidently be waived in many circumstances, for example, if the prince is dead, captive, a minor, mad, or absent, so that in an emergency, there would necessarily be no time to await his permission. This thesis is very similar to what Vitoria argues... that in ordinary circumstances, the Council of [of the Church] may not assemble without the permission of the pope, but, that the Council may assemble to declare certain papal decrees unlawful and resist them. In such a case, a Council may be summoned, even against the intentions of the Pope.¹²⁵

responsible for the conversion of all men, it was hard for any pope to refuse approval for a request to extend the Church in the wake of European expansion.' Muldoon, 'The Remonstrance of the Irish Princes and the Canon Law Tradition of the Just War,' 324.

124 Grotius, *De Indis*, 285; see *ibid.* 288–9.

125 Grotius, *Commentarius*, 255. Like Grotius, Vitoria does not cite Vladimiri by name, although 'Vitoria might have known Vladimiri's works on the period of the Council of Constance, the proceedings of which he quotes twice in *De Indis*.' Belch, *Paulus Vladimiri and His Doctrine Concerning Law and Politics*, 751. The two references are in Francisco de Vitoria, 'On the American Indians [*De Indis*]', in *id. Political Writings*, 240 and 241.

The utilisation of Conciliarism forms a necessary and indispensable part of the anti-hieratic strategy of *De Indis*. As the case of Vladimiri demonstrates, issues of colonialism and indigenous dispossession formed a central component of the conciliarist agenda; it was at the Council of Constance that, 'for the first time, the problem itself of the relationship of Christianity towards the infidel world was posed in its whole extent and in all of its aspects.'¹²⁶

The presence of conciliarist 'traces' provides a better explanation for the parallel presence of Voluntarism within *De Indis* than a post-Tacitean concern with Scepticism. Voluntarism, as an extension of Nominalism, formed a crucial element in conciliarist discourse,¹²⁷ and Conciliarism, in turn, provided the necessary philosophical preconditions for Divisible Sovereignty. By the early 17th century, jurists had reduced Conciliarism to two components: 'the assumption of conciliar sovereignty, which could be equated with parliamentary sovereignty, and the conciliar deposition of the Pope, which could be used as an argument in justification of the Parliamentary right of resistance to the King.'¹²⁸ Voluntarism—or, in the alternative, 'voluntaristic positivism'¹²⁹—as the signifier of conciliarist/nominalist discourse, serves a thoroughly juro-political purpose within the Grotian text, not an epistemological one, as Tuck would allow.

Grotius' 'free-floating' dependency upon the complex legacy of Late Scholasticism forces us to challenge the viability of the 'un-theistic' hypothesis as it governs both the Grotian theory of the minimal moral universe and its relation to the evolution of customary International Law, the ostensible 'discursive field' of the *De Indis*. It is telling that Tuck develops his view of Grotius as political theorist largely at the expense of Grotius as a 'primitive' international jurist. His overriding concern with the constitutional aspects of the Grotian Heritage leads him to largely restrict his consideration of Grotian legal theory to Property Law, concomitant with the presumed Grotian exposition of minimal moral philosophy. From the jurisprudential perspective of International Law, however, Grotius' primary significance lies within his role in the historical development of international legal custom. On the meta-discursive level the difficulty is whether

126 Moreau-Reibel, cited in Belch, *Paulus Vladimiri and His Doctrine Concerning Law and Politics*, 743.

127 Otto von Gierke, *Political Theories of the Middle Ages*, with Introduction by Frederic William Maitland (Cambridge: Cambridge University Press, 1900), 173 n. 256:

[Realists] explained the Lex Naturalis as an intellectual act independent of will—as a mere lex indicativa, in which God was not lawgiver but a teacher working by means of Reason—in short, as the dictate of Reason as to what is right, grounded in the being of God, but unalterable even by Him... The opposite proposition, proceeding from pure Nominalism, saw in the Law of Nature a mere divine command, which was right and binding merely because God was the lawgiver. So [the conciliarists] Ockham, Gerson, d'Ailly.

128 Zofia Rueger, 'Gerson, the Conciliar Movement and the Right of Resistance (1642–1644)', *Journal of the History of Ideas*, 25 (1964), 467–86 at 482.

129 Anton-Herman Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition', *New Scholasticism*, 17/2 (1943), 101–33 at 112.

minimal moral philosophy must necessarily logically presuppose a 'thin' ontology, or 'Presence'. In this way, situating *De Indis* within the particular discursive and material structures of the Capitalist World-Economy serves as an important hermeneutical innovation. Any lurking 'traces' of Tacitean/Lipsian scepticism within the Text are more persuasively accounted for as a necessary but incidental consequence of the utilisation of the discursive pole of Civic Humanism, the rhetorically indispensable foundation of 'apologetic' international legal discourse. Conversely, the Text's repeated shifts towards neo-Thomism is less grounded upon a strictly philosophical requirement to combat *scepsis* than upon the strategic necessity of allowing for a simultaneous reliance upon a Naturalist heterogenous international order, one alternately imperilled by *exclusively* 'thin' (*civitas*) and 'thick' (*monarchia universalis*) ontological constructions of civil society. The problem now becomes whether 'secularisation', the indispensable metaphysical precondition for the Grotian theory of Civil Society, is constitutive of an objective epistemic breach with the 'normative holism' of Primitive Legal Scholarship.¹³⁰

It is important to recall Koskenniemi's comment on Hobbes and Liberalism; both Tuck and 'the British School' are united in interpreting Grotius as expounding a 'thin' metaphysics, although Wight would certainly dissent from Tuck's minimalist/entrepreneurial view of the substantive moral content of Grotian international Civil Society. The alternative, or 'subversive' view, is that, from the perspective of the discursive requirements of the juridical taxonomy of customary International Law and *opinio iuris*, *De Indis* in fact argues for a *comparatively* 'thick' ontology/Presence. Grotius' rejection of Gentili's Humanist doctrine of pre-emptive strike is especially illuminating here. There is no morally 'thin' doctrine of Pre-emptive strike, but a robust Naturalist doctrine of Self-Defence, this reflecting the need to maintain a Naturalist-derived international public order, coupled with the pragmatic requirements of the hegemon in stabilising international politics. *De Indis*' reliance upon Late Scholasticism rather than Civic Humanism on this point marks a strategic discursive shift from 'thin' to 'thick' ontology, neo-Thomism constituting a modified neo-Realism premised upon a thinner ontology than Realism but not a pure form of Nominalism within its own right.¹³¹ If the 'thin' ontological foundation of minimal moral philosophy constituted Grotius' 'final' position—in the sense of an essentialist Presence rather than a rhetorical gesture—then wholly secular custom should serve as the self-sufficient auto-interpretative basis of International Law. On close examination this appears not to be the case.

The Text's operative binary set of *ius gentium primum* and *secundarium* implicitly replicates Aquinas' four-fold ontological division of the law: *lex*

130 Kennedy, 'Primitive Legal Scholarship', 79:

Despite... indicia of primitivism, several aspects of [Grotius'] method and theoretical typology of the law have led historians to suggest that Grotius began the reorientation of international law from theology to sovereign authority, thereby signalling the arrival of international legal positivism and ushering in the traditionalist era.

131 See above, Chapter Three.

aeterna, or 'eternal law', known only to God;¹³² *lex divina*, the law of God known by humans only through divine revelation; *lex naturalis*, the participation of rational creatures within the scope of eternal law; and *lex humana*, positive law enacted by human beings. Significantly, Aquinas distinguishes *ius gentium* from the other sources of positive law precisely on the basis of its innate and self-sufficient rationality, situating it in an immediate and necessary relationship to *ius naturale*. It is exactly this taxonomic categorisation of *ius gentium* as *ius naturale* that establishes International Law's Naturalist origins, as Koskenniemi never tires of reminding us. As demonstrated by Tuck, Grotius, in an expressly anti-Aristotelian manoeuvre, identifies *habitus* with Divine Ordinance; Providential Being serves as the foundational principle of the whole of *De Indis*. Where the Text supersedes Tuck's account, however, is precisely in those passages where Grotius moves towards a more orthodox Thomistic account of *appetitus socialis* as demonstrative of a descending hierarchy metaphysical that legitimates *recta ratio*.

For God has not willed that nature shall supply every region with all the necessities of life; and furthermore He has granted pre-eminence in the different arts to different nations. Why are these things so, if not because it was His Will that human friendships should be fostered by mutual needs and resources, lest individuals, in deeming themselves self-sufficient, might thereby be rendered unsociable? In the existing state of affairs, it has come to pass, in accordance with the design of Divine Justice, that one nation supplies the needs of another, so that in this way... whatever has been produced in any region is regarded as a product of all regions.¹³³

At fundamental variance with the prescriptive secularism of contemporary international legal discourse, Grotius propounds not only the derivative categorical status of *opinio iuris*, but also the express ontological privileging of Divine Will over secular legal custom. Effectively precluding *ius voluntarium*, Grotius insists that secular custom must be suspended in the event of contradiction with *ius naturale*, thereby recapitulating the *descending* hierarchy of Thomism; 'What could be clearer than the fact that a custom diametrically opposed to a law of nature, or to the law of nations, is not valid? Custom is a form of positive law, and positive law cannot invalidate universal precepts.'¹³⁴

At this point, *De Indis* exactly parallels Suarez's *De legibus*, premised upon an identical descending metaphysical hierarchy. Suarez scrupulously follows Aquinas in identifying *lex naturalis* with *lex aeterna* and *lex divina*: 'Natural law... is contained primarily in the eternal law and secondarily in the judicial

132 Identified with both *Logos* and *Ordo*, the necessary sign of 'thick' ontological Realism; 'Grotius' concept of natural law as the participation of human reason in the eternal law is entirely in harmony with Scholastic doctrine' Vermeulen and van der Wal, 'Grotius, Aquinas and Hobbes', 73; see also *ibid.* 58–62 and 70–5.

133 Grotius, *De Indis*, 218.

134 *Ibid.* 249.

faculty... the natural law is truly and properly divine law, of which God is the Author.' ¹³⁵ Similarly, for Grotius, *ius naturale* is subordinate to *lex naturalis*, which is identical to *lex divina*. *Ius naturale*, in turn, is superior to *ius gentium secundarium*, ¹³⁶ expressed as 'positive human law', or *ius civile*.

[*Ius gentium secundarium*] has a close affinity with the natural law, so that many persons confuse it therewith, or hold that the *ius gentium* is part of the natural law; and, furthermore, even in those aspects wherein the two are distinguished, the kinship is very close and the *ius gentium* constitutes an intermediate form (so to speak) between natural and human law, a form more closely allied to the first of these extremes. ¹³⁷

Both Grotius' logic and rhetoric is impeccably Late Scholastic.

Ius gentium differs from the natural law, primarily and chiefly, because it does not, insofar as it contains affirmative precepts, derive the necessity for these precepts solely from the case, by means of a manifest inference drawn from natural principles; for everything of this character is [strictly] natural... Hence, such necessity [as may characterize the precepts of *ius gentium*] must be derived from some other source. Similarly, the negative precepts of the *ius gentium* forbid nothing on the ground that the thing forbidden is evil in itself; for such prohibitions are [properly within the province of] the natural law. From the standpoint of human reason, then, the *ius gentium* is not so much indicative of what is [inherently] evil, as it is constitutive of evil. Thus it does not forbid evil acts on the ground that they are evil, but renders [certain] acts evil by prohibiting them... Therefore, the conclusion would seem to be... that the *ius gentium* is in an absolute sense human and positive. ¹³⁸

¹³⁵ Suarez, 'A Treatise On Laws and God the Lawgiver', 191 and 198. For Skinner, this ontological fusion is a critical feature of seventeenth-century neo-Thomism, as it recapitulates the original Thomistic move towards neo-Realism effected in the 13th century.

The law of nature is said to possess a dual essence. It embodies the quality of law both because it is *intellectus* (it is intrinsically just and reasonable) and because it is *voluntas* (it is the will of God). [The neo-Thomists] thus take up a middle position between the early realists on the one hand, for whom the law of nature was lawful simply because it was just, and the later nominalists on the other, for whom it was lawful simply because it expressed the will of God.

Quentin Skinner, *The Foundations of Modern Political Thought. Volume Two: The Reformation* (Cambridge: Cambridge University Press, 1978), 149.

¹³⁶ Grotius, *De Indis*, 344.

¹³⁷ Ibid. 325. For a discussion of Grotius' deployment in *De Iure Belli ac Pacis* of a similarly descending taxonomy of *ius naturale*, *ius gentium*, and *ius civile*, albeit one embedded within a much 'thinner' ontological framework, see Zuckert, *Natural Rights and the New Republicanism*, 126–34.

¹³⁸ Grotius, *De Indis*, 342–3.

Because of its derivative status, *ius gentium*, unlike *ius naturale* but exactly like *habitus*, proves potentially subject to historical vicissitude. The Humanist rhetoric of constitutional construction is now applied directly to International Law, but only in such a way as to re-enforce the ontological subordination of the ascending argument to the descending.

Changes are far more difficult [with international law than municipal law] for this... involves law common to all nations and appears to have been introduced by the authority of all, so that it may not be annulled [even in part] without the universal consent. Nevertheless, there would be no inherent obstacle to change, insofar as the subject matter of such law is concerned, if all nations should agree to the alteration, or if a custom contrary to [some established rule of this law of nations] should gradually come into practice and prevail.¹³⁹

Natural reason, or *naturalis ratio*, governs both *ius naturale* and *ius gentium*; '*Ius gentium* is established with general force in the form of a conclusion not absolutely necessary, but so in harmony with nature that it is inferred (as it were) at the instigation of nature.'¹⁴⁰ It is *this* ontologically 'thin' but metaphysically derivative—and theologically inferior—form of 'the law of nations' that actually serves as the practical application of *ius naturale* through the volitional determination of social value; even if an 'action is not [expressly] forbidden by God, it still does not follow that such an action is not evil, since by its very nature it does possess this quality, apart from any prohibition.'¹⁴¹ Morality, therefore, ultimately depends upon the correct mediation between positive law and Divine Will.

An offence against the natural law is a sin in the true sense; therefore, such an offence is a violation of a divine and heavenly mandate; and consequently, the natural law, as it exists in man, has the force of a divine mandate, indicating such a mandate... and not merely the nature of its own subject matter.¹⁴²

The influence of Spanish sources is underscored by the Text's express reliance upon the radical Humanist and jurist Fernando Vazquez de Menchaca (d. ca. 1559).¹⁴³

139 Ibid. 356.

140 Ibid. 344.

141 Ibid. 200.

142 Ibid. 194.

143 Ibid. 249–53. Vazquez's wholly expedient and short-lived adoption of a proto-Grotian notion of *mare liberum* was occasioned by Spain's attempt to violently penetrate the Portuguese trade monopoly with the Philippines. Tuck, *The Rights of War and Peace*, 76–7. However, contrast this with Ehrlich, 'The Development of International Law as a Science', 201:

Vazquez's statements about prescription and about the sea were probably influenced by the fact that his master, the king of Spain, was the ruler of the Kingdom of Naples

Vazquez... having laid down a thesis... that public places which are common by the law of nations cannot be made the objects of prescription¹⁴⁴... rightly observes that the truth in regard to such matters rests upon a true conception of both the law of nature and the law of nations. [He] argues that the law of nature, since it proceeds from Divine Providence is immutable¹⁴⁵; and that the primary law of nations [*ius gentium primum*] (which is regarded as different from the secondary or positive law of nations, the latter being susceptible to change whereas the former is immutable), constitutes a part of natural law. For if there are certain customs incompatible with the primary law of nations, they are customs proper not to human beings... but to *wild beasts*;¹⁴⁶ neither do they represent law and usage, but rather, corruption and abuse; and therefore, they cannot have assumed the form of prescriptions as the result of any interval of time whatsoever, they cannot have been justified by the establishment of any law, nor can they have been definitely confirmed by agreement, acceptance, and practice even on the part of many nations.¹⁴⁷

Expressed in contemporary terms, Grotius is offering a *ius cogens* derived critique of positive law doctrine, a universal set of non-derogable, peremptory norms of transcendental origin that operationally 'override' state-centric positive law. Utilising the Thomistic hierarchy of the descending ontological categories of law, *De Indis* seeks to nullify positive law whenever in conflict with the freedom of both trade and navigation, these as necessary categories of *lex aeterna*. Not merely are the Portuguese barred from blocking the Dutch by their failure to positively demonstrate *occupatio duplex*; here, a much 'stronger' ontology is strategically employed, preventing the Portuguese from ever establishing such a positive right in perpetuity through the Naturalist principle of *extra commercium*.

and Sicily the interests of which were affected by the claims of Venice to the mastery, if not of the Adriatic, at least of a considerable part of it.

Significantly, Grotius makes no express reliance upon Suarez even though he either replicates or anticipates the Jesuit's carefully delineated descending hierarchy between the primary and secondary law of nations.

- 144 Under *ius gentium secundarium* only Land became subject to lawful prescription: 'The reason for the difference between sea on the one hand, and the land, the rivers, on the other is that in the former case... the primeval right has stayed intact, and was never partitioned off from the common use of men, and applied to any particular individual or individuals.

Consequently, 'in the oceans and the open waters there neither is, nor can be, any right for the human race, apart from with respect to the common use', or usufructary rights. Vazquez, cited in Brett, *Liberty, Right and Nature*, 189.

- 145 Linked to the School of Salamanca, Vazquez, uncharacteristically for a Civic Humanist, utilises Divine Law in staking out his position against the Late Scholastics. For an excellent but highly contentious discussion of the understudied Vazquez, see Brett, *Liberty, Right and Nature*, 165–204; Brett treats Vazquez's theory of prescription at 186–204.

- 146 A not so subtle reference to the Portuguese.

- 147 Grotius, *De Indis*, p. 250. Emphasis added.

On the one hand, there is complete consistency with Tuck's view. Human 'Sociability' is derived from a metaphysical source—the Divine Will—that invests *habitus* with irresistible Presence. On the other hand, the clear inability of positive secular law to pre-empt *lex aeterna* inflicts both rhetorical and logical 'violence' upon the implicit normative and epistemological assumptions discursively underpinning an internally consistent application of the minimal moral life, and, by extension, Civic Humanism. Understood within the totality of the Grotian discourse, the expedient taxonomic re-classification of *opinio iuris* as *lex aeterna* can only be seen to operate intelligibly within the parameters of an orthodox Naturalism, one suffused by a comparatively 'thick' neo-Realist ontology, and one that is, by necessity, consistent with an un-fractured normative holistic framework.¹⁴⁸ Kennedy has made this point clear.

Grotius does seem to distinguish himself from Suarez and Vitoria by secularising natural law, thereby distinguishing it from divine will. His resulting search for norms in state practice would seem positivist were his secularisation a relocation of normative authority from divine to sovereign will. This, however, does not seem to be the case... Although manifested by sovereign practice, natural law accords with and is binding as a matter of divine law... In secularising natural law, Grotius does not create a legal sphere either grounded in sovereign authority or which is not also binding as a matter of morality... To the traditional positivist, sovereign consent provides the origin of international law's binding force. To Grotius, the obligation to fulfil the terms of a sovereign promise arises from the uniformity of natural law with the principles of right reason upon which sovereign authority rests. Although the sovereign may bind himself in matters not touched by the divine or natural law, these obligations, based on his authority, neither derogate from natural or divine law nor limit the sovereignty which he exercises as a matter of natural or divine law. These promises, moreover, are themselves binding only as a matter of natural and divine practice expressive of the 'law itself'... Grotius' distinction between divine and natural law exemplifies rather than undercuts the notion that law and morality are one and that the normative force of the legal order is derived from outside the will or authority of sovereigns... [Furthermore] volitional law derives its normative force from the natural and divine order, not the authority of sovereigns. The volitional law merely fleshes out what the natural law has left unclear and can exist only in the interstices of divine and natural law.¹⁴⁹

148 Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition', 115:

Only by showing to what extent Grotius relied upon Thomistic sources we may be able to understand more completely his own attitude towards the ultimate grounds and problems of Natural Law. Should this thesis prove correct, then the often disputed continuity of Natural Law thinking clearly would stretch from St. Thomas and the Thomistic-Scotistic controversy through the Spanish 'Jurist-Theologians' directly down to Hugo Grotius.

149 Kennedy, 'Primitive Legal Scholarship', 79–82.

Paradoxically, we witness a 'thick' ontology governing a minimal (or 'privatised') morality that legitimates the violent enforcement of the 'strong' right of commutative justice by non-state actors: *bellum iustum*. The otherwise arbitrary invocation of a 'strong' metaphysics-of-Presence within the juridically 'empty' space of *extra commercium* (the High Seas) is the only means of legitimating a transcendental notion of Just War within an oceanic medium that supersedes all lawful prescription.

The discursive oscillation present within *De Indis* may thus be said to operate solely on the 'micro-level'; that is, in a manner wholly internal to the parameters of Late Scholasticism. Nowhere does Grotius consistently espouse a coherent Humanist approach as an ascending hierarchy based upon inductive reasoning; instead, disparate Humanist elements are strategically incorporated into an overarching descending hierarchical structure of deduction that governs the tactical manoeuvres between contending substantive propositions of both Humanist and Scholastic discourse.¹⁵⁰

VI *Respublica* and Original Personality

Our conclusion must be necessarily complex and highly nuanced. First of all, Tuck is undoubtedly correct in his most important assertion: that *De Indis* does meet Grotius' over-arching objective in fracturing the 'classical' Aristotelianism underpinning orthodox Civic Humanism. Read this way, Tuck's work can only aid and assist in the CLS-type of project undertaken here. What is more problematic, however, is the compatibility of Tuck's reading of Grotius and Primitive Legal Scholarship.

The 'structural arc' linking Amsterdam with Venice serves as a near-perfect conduit for the transmission of 'classical Republicanism', or the 'Machiavellian Moment', provided that sufficient attention is paid to the local sectarian and constitutional conditions prevailing in the United Provinces. Tuck's appropriation of Grotius fits in plausibly both with Pocock's original formulation, as well as with World-System Analysis. But these same historical concerns necessitate a more circumscribed approach to Tuck. The greater part of the Grotian Heritage is due less to the operational presence of an alternative political/philosophical

150 Even the proto-positivist Gentili, who advocated a 'true' Humanism of ascending hierarchy, nominally adheres to a descending hierarchical argumentative structure: 'There are everywhere certain unwritten laws, not enacted by men... but given to them by God.' Gentili, *De Iure Belli*, 9–10. Grotius appears to have expressly relied upon this passage in *De Indis*, 11–12:

Man [is] one who is peculiarly endowed not only with the affections shared in common with other creatures, but also with the sovereign attribute of reason: that is to say, as in a being derived from God Himself, who imprinted upon man the image of his own Mind... *To be sure, this rational faculty has been darkly beclouded by human vice; yet not to such a degree but that the rays of divine light are still clearly visible, manifesting themselves especially in the mutual accord of nations.*

Emphasis added.

tradition than to the more immediate expediencies of the discursive negotiation of hegemonic transition. Although Tanaka is correct in emphasising the strong presence of utility within Grotian discourse,¹⁵¹ the 'post-Aristotelian' reconfiguration of the international juridical landscape, resulting in the investiture of the VOC with Original Personality, is more properly indicative of a strategic discursive shift towards the purely rhetorical facet of Civic Humanism at the expense of the substantive, or philosophical, branch.

The residual coherence of the *De Indis* as a 'finished' work— purportedly the locus of 'the first truly modern political theory'¹⁵²— is ultimately mediated through the arche-trace of the Modern World-System, structurally channelling the republican 'privatisation' of international juro-political authority. This discourse operates on a two levels: short-term and contingent and long-term and structural. The prize taking of the *Santa Catarina* itself compelled Grotius to utilise (if not actually *invent*) a viable model of juridical interpretation commensurate with the duality of the Dutch state(s): the non-Aristotelian sub-division of Particular Justice into Commutative and Distributive. As Heller reminds us

The legal system should be understood as a self-producing text of theoretically unintegrated practices which refers to legal theory only when some local practice [here, privateering] becomes unsettled. The continuing presence of contradictory practices is not a consequence of mistaken judgements to be corrected by a more competent application of structural principles but a normal and stable condition of the system. Theory, only exceptionally involved in the legal system, is represented by a complex system of seemingly competing symbols that have only an analogical and indeterminate bearing on the resettlement of disturbed practices.¹⁵³

The political logic of the Dutch cycle of systemic accumulation within the Modern World-System mandated the investiture of the VOC, a joint-stock company, with Original Personality. This yielded the emergence within the heteronomy of the World-Economy a 'primitive' trans-national corporation as the individual/atomistic bearer of 'marks of sovereignty', internationally and nationally recognisable. This, in turn, was coupled with the correspondent legitimization of organised violence, subordinate to the slightly revised Scholastic/neo-Realist doctrine of *bellum iustum*, as a lawful means of enforcing interstate recognition and enforcement of said 'marks'. The successful privatisation of international authority, in turn, ultimately depended upon the Grotian iterability between State and Person, justified through the tactical discursive utilisation of the 'thin' ontology of Humanism.

The analogical relationship between 'primitive' international discourse and a 'primitive' multi-national company is not merely a Derridean 'pun'; rather,

151 Tanaka, 'Grotius' Method', 14–17 and 29.

152 Tuck, *The Rights of War and Peace*, 232.

153 Thomas C. Heller, 'Structuralism and Critique', *Stanford Law Review*, 36 (1987), 127–98 at 191.

the analogy directly underscores the textual/historical reality governing the emergence of International Law. *De Indis*, does, in fact, continue along an unbroken trajectory of Primitive Legal Scholarship, the continuity with normative holism maintained through reliance upon the Natural Law basis of 'legitimacy' of Private War. This continuity operates through the medium of methodological taxonomy and discursive formation. Within the 'primitive' normative holism of *ius naturale*, *De Indis* is rhetorically 'suspended' between the antinomies of 'thick' and 'thin' ontological discourse, each pole governed by the conflicting impulses of the political logic of the Modern World-System of the 'long' 16th century. Grotius, as a Dutchman, inherited the burden of 'hegemonic legitimation' from the Iberian scholastics, expressed textually. Thanks to the Grotian Heritage, the 'true' hegemon is to be republican, Capitalist, Protestant but anti-sectarian, committed to re-organising the over-arching Capitalist World-Economy on the basis of *liberum commercium*, and reliant upon lawful self-defence against territorialist aggression in the protection of *ius*. His truly innovative gesture consists of 'translating' the structural logic of the early Modern World-System into juro-discursive form. The contours of this 'trace' will emerge more clearly when we situate *De Indis* in terms of the contending assumptions of Gentili and Vitoria on Piracy and Indigenous Peoples.

Chapter Seven

'Concerning The Indies':

Ius Naturale, Privateers, Pirates and Anti-Systemic Movements

[A] transformation may take place, not merely in the case of individuals, as when Jephtes, Arsaces, and Viriathus instead of being leaders of brigands, became lawful chiefs, but also in the case of groups, so that those who have been robbers embracing another mode of life became a state.

(Hugo Grotius)

In the *Historica*, Grotius mentions a mysterious Portuguese renegade known only as 'Rasalala';¹ a 'Portuguese by origin, born in Areiro, but an apostate from the Christian faith and by no means un-renowned as the leader of the pirates in those regions.'² Not satisfied with merely abjuring Christ, Rasalala had set himself at the head of a private army and seized political power in Sidajoe.

In compliance with a command received from the... ruler of Tuban and from the Portuguese... Rasalala, who had grown famous through his robberies, had gone to almost all of the Malaccas accompanied by soldiers from Tuban and by twenty Portuguese officers, with the purpose of driving the Dutch traders from the entire region... Certainly that pirate sailed from those parts with approximately forty proas directly to Java where (so he had been given to understand) the Dutch vessels had come into port; for he was bound by an oath to capture or destroy any such vessel [that he could find]. With this end in view, he was soliciting aid in the name of the King of Tuban from the Regent of Bantam himself. From Java, Rasalala went on to Jakarta, with the intention of seizing such opportunities as might be propitious for the setting of his snares.³

Rasalala, like other such Pirates, or 'pariah entrepreneurs',⁴ bears the sign of what anthropologists call 'liminality', the traversing of cultural frontiers.

1 Tentatively identified as the Rajah of Lalang. Hugo Grotius, *[De Indis] De Iure Praedae Commentarius. Comentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (London: Wildy & Sons: London, 1964), 189.

2 Ibid.

3 Ibid. 192.

4 Manuel Castells, *Economy, Society and Culture* (vol. iii of *End of the Millennium: The Information Age*)(Oxford: Blackwell Publishers, 1998), 166–205; 'a private agent who

The attribute of liminality, or of liminal *personae* ('threshold people') are necessarily ambiguous, since this condition and these persons elide or slip through the network of classifications that normally locate states and positions in cultural space. Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arranged by law, custom, convention and ceremonial.⁵

The Pirate's archetypal 'anti-social' status as 'enemy of all mankind'—the Pirate as one who takes up arms against both his natural and political family (the State)—is a dominant motif within piratical literature and jurisprudence. The 'first cousin' to the Pirate, the Bandit/Brigand, also exhibits similar liminal qualities.

The crucial fact about the bandit's social situation is its ambiguity. He is an outsider and rebel, a poor man who refuses to accept the normal rules of poverty... This draws him close to the poor; he is one of them. It sets him in opposition to the hierarchy of power, wealth and influence; he is not one of them... At the same time the bandit is, inevitably, drawn into the web of wealth and power, because, unlike other peasants, he acquires wealth and exerts power. He is 'one of us' who is constantly in the process of becoming associated with 'them'.⁶

The liminal Pirate/Brigand constitutes an exquisitely material embodiment of the Derridean principle of iterability, 'rhetorical reversibility'.⁷ In addition to blurring the orthodox demarcations between religious (i.e., the *renagodoes* of the Barbary

manages to achieve monopoly over violence in a specific territory [who] eventually becomes a public actor.' Raimondo Catanzaro, 'Violent Social Regulation: Organized Crime in the Italian South', *Social and Legal Studies*, 3 (1994), 267–79 at 270.

5 Victor Turner, *The Ritual Process: Structure and Anti-Structure* (Ithaca: Cornell University Press, 1969), 95; see *ibid.* 94–130 and 166–203; Victor Turner, *Drama, Fields, and Metaphors: Symbolic Action in Human Society* (Ithaca: Cornell University Press, 1974), 231–70; Arnold van Gennep, *The Rites of Passage* (London: Routledge and Kegan Paul, 1977), 1–8, 20–5, 144–5 and 191–4.

6 Eric Hobsbawm, *Bandits* (London: Weidenfeld & Nicolson, 1969), 87–8.

7 For iterability's relationship with both 'alteration' and 'replication', see Rudolphe Gasche, *The Tain of the Mirror: Derrida and the Philosophy of Reflection* (Cambridge: Harvard University Press, 1986), 212–17.

Coast),⁸ racial⁹ and gender¹⁰ (i.e., trans-sexuality¹¹ and homosexuality¹²) identities, the Pirate was the quintessential 'juridical nomad' who frequently traversed the porous juridical spaces separating unlawful maritime 'pariah entrepreneur' and the ostensibly 'lawful' Privateer. In parallel fashion, the High Seas as juridically 'empty' space *res extra commercium* signify a liminal cultural zone, subverting all taxonomic classifications of established juridical hierarchies. In more prosaic terms, 'if you stuck to the territoriality principle, the high seas was nothing but a huge expanse of lawlessness'.¹³ Both the Pirate and the law-less/empty Sea that (s)/he signified constitute an unparalleled example of the necessity to border thinking.¹⁴

I The Indian Ocean World System

The establishment of the Corporate Sovereignty of the VOC took place within the contours of a pre-existent Indian Ocean world system;¹⁵ European core states

8 Peter Lamborn Wilson, *Pirate Utopias: Moorish Corsairs & European Renegades* (Brooklyn, NY: Autonomedia, 1995), 39–69.

9 Kenneth J. Kinkor, 'Black Men under the Black Flag' in C.R. Pennell (ed.), *Bandits at Sea: A Pirate Reader* (New York: New York University Press, 2001), 195–210, *passim*.

10 'Attributes of sexlessness and anonymity are highly characteristic of liminality. In many kinds of initiation where the neophytes are of both sexes, males and females are dressed alike and referred to by the same name.' Turner, *The Ritual Process*, 102–3.

11 John C. Appleby, 'Women and Piracy in Ireland: From Grainne O'Malley to Anne Bonny', in C.R. Pennell (ed.), *Bandits at Sea: A Pirate Reader* (New York: New York University Press, 2001), 283–98, *passim*; Dian Murray, 'Cheng I Sao in Fact and Fiction', in C.R. Pennell (ed.), *Bandits at Sea: A Pirate Reader* (New York: New York University Press, 2001), 253–82, *passim*; Marcus B. Rediker, 'Liberty Beneath the Jolly Roger: The Lives of Anne Bonney and Mary Read, Pirates', in C.R. Pennell (ed.), *Bandits at Sea: A Pirate Reader* (New York: New York University Press, 2001), 299–320, *passim*.

12 Barry R. Burg, *Sodomy and the Pirate Tradition: English Sea Rovers in the Seventeenth Century* (New York: New York University Press, 1995), 211–73; Dian Murray, 'The Practice of Homosexuality among the Pirates of Late-Eighteenth and Early Nineteenth-Century China', in C.R. Pennell (ed.), *Bandits at Sea: A Pirate Reader* (New York: New York University Press, 2001), 244–52, *passim*.

13 Jacob W.F. Sundberg, 'Piracy: Air and Sea', *De Paul Law Review*, 20 (1971), 337–435 at 393.

14 See above, Chapter Two.

15 'The Indian Ocean as-a-World-System was the basic dimension in which the European expansion existed and carried out its activities. It was not created by this expansion, but provided the necessary pre-condition for it to function.' Jan Kieniewicz, 'Contact and Transformation: The European Pre-Colonial Expansion in the Indian Ocean World-System in the 16th–17th Centuries', *Itinerario*, 8/2 (1984), 45–58 at 46. See Janet

were able to efficiently 'use their own vitality to manoeuvre [South Asian economies] to [their] own advantage... [because core states already] formed a series of coherent economies linked together in a fully operational world-economy.'¹⁶ The relative robustness of the Indian sub-system¹⁷ effectively thwarted the colonialist practice of incorporation, the formal subordination of a political entity into the hierarchical World-Economy.¹⁸ Instead, the immediate strategy of the Dutch was

L. Abu-Lughod, 'Discontinuities and Persistence: One World System or a Succession of Systems?', in Andre Gunder Frank and Barry K. Gills (eds), *The World-System: Five Hundred Years or Five Thousand?* (New York: Routledge, 1993), 278–91, *passim*; Andre Wink, 'Al-Hind: India and Indonesia in the Islamic World-Economy, c. 700–1800 A.D.', *Itinerario*, 12 (1988), 33–72, *passim*.

- 16 Fernand Braudel, *The Perspective of the World* (New York: Harper & Row, 1984), 496.

- 17 'The geographical and economic centre of this Indian Ocean world was the Indian subcontinent itself.' Andre Gunder Frank, *ReOrient: Global Economy in the Asian Age* (Berkeley: University of California Press, 1998), 85. The world system elements of the Indian Ocean economy were centred upon the north-south axial division of labour and production.

The world-economy of the Indian Ocean did not lack differentiation. As a nexus of commercial and political relations it was not created by European expansion. Unlike the Pacific Ocean, the 'Arabic-speaking Mediterranean' had its own historical personality which had come to maturity in the centuries preceding Vasco da Gama. The Europeans, like others before them, took advantage of perennial ecological differences between the tropical 'primary' zone and the subtropical 'industrial' zones of Asia.

Wink, 'Al-Hind', 65. Subrahmanyam also sees the north-south axis as vital.

Whereas during the years 800 to 1300, the main axis of long-distance commercial flows in Asia appears to have been in the east-west direction (both on the caravan routes through Central Asia, and on sea), the years after 1300 saw the rise of commerce largely in the north-south direction. Indian trade with Southeast Asia and East Africa grew, as did Chinese trade with insular Southeast Asia. The increase was largely based on the exchange of tropical products, such as spices and wood, and minerals, against manufactures like Chinese porcelains and silks and Indian cotton textiles.

Sanjay Subrahmanyam, 'Of *Imarat* and *Tijarat*: Asian Merchants and State Power in the Western Indian Ocean, 1400 to 1750', *Comparative Studies in History and Society*, 37 (1995), 250–80 at 254. Contemporary sources from the 16th Century leave no doubt that the Europeans understood themselves to be infiltrating an integrated regional trade system. See Robert Markley, 'Riches, Power, Trade and Religion: the Far East and the English Imagination, 1600–1720', *Renaissance Quarterly*, 17/3 (2003), 494–516, *passim*.

- 18 The incorporation of South Asia did not take place until c. 1800 during the establishment of the Modern World-System. Ravi Arvind Palat and Immanuel Wallerstein, 'Of what world-system was pre-1500 'India' a Part?', in Susil Chaudhury and Michael Morineau (eds), *Merchants, Companies and Trade: Europe and Asia in the Early Modern Era* (Cambridge: Cambridge University Press, 1999), 21–41, *passim*; K.N. Chaudhuri, 'The World-System East of Longitude 20 degrees: the European Role in Asia 1500–1750', *Review*, 5/2 (1981), 219–45, *passim*. We may date the era of

co-operative penetration, the establishment of reasonably equitable commercial inter-linkages.¹⁹

This shift away from forcible incorporation governed the discursive formation of *De Indis* in at least two ways. Firstly, the Text deliberately framed its discussions 'Concerning the Indians' in terms of an implied recognition of an indigenous world system. The argument is in two parts. Firstly, the Portuguese have failed to establish *dominium/proprietas* under the terms of *occupatio duplex*.

incorporation from 1757 (the Battle of Plassay) to 1857 (the suppression of the 'sepoy' or Indian Mutiny).

Between 1750 and 1850, South Asia was effectively *subjugated*, territorially and commercially, to the drive of an expanding European world-system. On the one hand, the political economy of South Asia was displaced through its incorporation into the European world-system. What was once relatively external to that system is said to have become permanently internal to it. On the other hand, the political economy of South Asia was reversed through its sustained colonization. It was transformed into a zone made territorially and commercially dependent upon what, by 1815, had become the hegemonic power in the European system—namely, Great Britain.

Ravi Arvind Palat, et al., 'The Incorporation and Peripheralization of South Asia, 1600–1950', *Review*, 10/1 (1986), 171–208 at 178–9.

19 Wink, 'Al-Hind', 62:

The conclusion is inescapable that at this stage of the open frontier of European expansion the pattern of dominion was characterized by dispersal through shifting and opportunistically motivated combinations with local power holders, and not by territorial delimitation of 'sovereignities' or by 'colonial warfare' as known from the nineteenth and twentieth centuries. The pre-colonial State, whether European or Asian, remained essentially open-ended.

Abu-Lughod has persuasively argued that the successful Anglo-Dutch penetration of the Indian sub-system was due to the earlier politically weakening of a previously more integrated world economy.

Pathways and routes developed by the thirteenth century were later 'conquered' and adapted by a succession of European powers. Europe did not need to *invent* the system, since the basic groundwork was already in place by the thirteenth century when Europe was still only a peripheral and recent participant. In this case, the rise of the West was facilitated by the pre-existing world economy that it restructured.

Janet L. Abu-Lughod, *Before European Hegemony: The World-System A.D. 1250–1350* (Oxford: Oxford University Press, 1989), 361. The prior 'Fall of the East' was due primarily to a series of wholly contingent geo-political variables: the Black Death (1347–51); the disintegration of Pax Mongolica; the isolationism of Ming China; prolonged indigenous warfare in the Straits of Malacca; the destruction of the Mamluk Empire; and the transition of the Ottoman Empire from a sea to a land power. See Janet L. Abu-Lughod, *The World System in the Thirteenth Century: Dead-End or Precursor?* (Washington D.C.: American Historical Association, 1993), *passim*; Janet L. Abu-Lughod, 'Restructuring the Premodern World-System', *Review*, XIII (1990), 273–86, *passim*; Janet L. Abu-Lughod, 'The Shape of the World System in the Thirteenth Century', *Studies in Comparative International Developments*, 22 (1987–88), 3–53, *passim*; Abu-Lughod, 'Discontinuities and Persistence', *passim*.

We hold that the Portuguese are not the owners of the regions visited by the Dutch (that is to say, Java, Sumatra, and most of the Moluccas), on the basis of the incontrovertible argument that no one is owner of a thing that has never been taken into his possession either by his own direct action or by another party acting in his name.²⁰

From this, it follows that the residual element flowing from negative Portuguese 'absence' is the 'presence' of an East Indian sub-system.

The islands in question now have, and always have had, their own rulers, governments, statutes, and legal systems. The Portuguese, like other peoples, are permitted to carry on trade there. Indeed, by paying the tribute levied and also by the very act of petitioning the rulers for the right to trade, the Portuguese themselves testify clearly enough to the fact that they are not the owners of those lands, but foreign visitors. Their very residence in the islands is allowed as a favour.²¹

The 'presence' of this world economy, in turn, discursively complements the Grotian doctrines of *occupatio duplex* and *res nullius*.

Therefore, since the Portuguese lack both possession and title to possession, since the property and sovereign powers of the East Indians ought not to be regarded as things that had no owner prior to the advent of the Portuguese, and since that property and those powers—belonging as they did to the peoples of the Indies—could not rightly be acquired by other persons, it follows that the said peoples are not Portuguese chattels, but free men possessed of full and social rights.²²

Secondly, the discursive centrality of *mare liberum* is textually re-grounded, as an indigenous variant of the Freedom of the High Seas had been operationally central to the Indian sub-system.²³ Therefore, wholly independent of Grotian discourse, the global governance of the heteronomous Indian Ocean logically mandated a

20 Grotius, *De Indis*, 220.

21 Ibid.

22 Ibid. 226.

23 R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Dordrecht: Martinus Nijhoff Publishers, 1983), 10–39; R.P. Anand, *Confrontation or Cooperation? International Law and the Developing Countries* (Dordrecht: Martinus Nijhof Publishers, 1987), 53–71; C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967), 60–5; Om Prakash, *Asia and the Pre-Modern World Economy* (Leiden: International Institute for Asian Studies, 1995), *passim*; Neils Steensgaard, 'The Indian Ocean Network and the Emerging World-Economy, c. 1500–1750', in Satish Chandra (ed.), *The Indian Ocean: Explorations in History, Commerce and Politics* (New Delhi: Age Publications, 1987), 125–50, *passim*; M.A.P. Meilink-Roelofs, *Asian Trade and European Influence in the Indonesian Archipelago Between 1500 and About 1630* (The Hague: Martinus Nijhoff, 1962), 36–88; Ashin Das Gupta, 'The Maritime Trade of Indonesia: 1500–1800', in Ashin Das

juridical regime premised upon *ius naturale*.²⁴ This is best illustrated by the indigenous laws relating to Piracy 'which authorized common action of all maritime powers in the vast expanse of oceanic waters for the purpose of maintaining maritime safety.'²⁵ Braudel has commented on the World-System significance of the 'great pirate belt' stretching from the West to the East Indies throughout the 17th century, precipitating a crisis in global governance; 'the increase and ubiquity of piracy were related to the breaking up of the great empires: the Turkish and Spanish, the Empire of the Great Moghul and the decline of China under the Ming.'²⁶ The taxonomic re-classification of the legal demarcations between Piracy and Privateering would serve as an integral component of the newly established Capitalist World-Economy, premised upon a discursive shift away from 'closed' and towards 'open' seas. The Grotian signature of micro-oscillation, at times contradictory, between Late Scholasticism and Civic Humanism was thus perfectly structured by the instuarated arche-trace provided by the Indian Ocean world system, rationalised by the need to mediate between contending approaches of *mare liberum* and *mare clausum*.²⁷

Gupta and M.N. Pearson (eds), *India and the Indian Ocean 1500–1800* (Calcutta: Oxford University Press, 1987), 81–115, *passim*.

- 24 Alexandrowicz has broadly hinted at a self-conscious awareness by Grotius for the need for a coherent regime of geo-governance within the East Indies.

Historians have often overlooked one aspect of the problem [of the establishment of Corporate Sovereignty] which was significant to Grotius, that is the study of the actual regime of the Indian Ocean, which he carried out in the archives of the Dutch Company, on the formulation of the doctrine of *mare liberum*, at a time when the doctrine of *mare clausum* was more prevalent in European State practice than the ideal of the freedom of the high seas.

Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, 44.

- 25 Ibid. 64.

- 26 Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, ii (London: Fontana/Collins, 1972), 865.

- 27 Abu-Lughod has intriguingly suggested that the indigenous practice of Freedom of the Seas may itself have contributed to the eventual incorporation of the Indian Ocean world system.

The old world system that was deeply penetrated by the Portuguese intruders in the early sixteenth century offered little resistance. Why? Perhaps it had adapted so completely to the coexistence of multiple trading partners that it was unprepared for players interested in short-term plunder rather than long-term exchange. More than anything else, then, it was the new European approach to trade-cum-plunder that caused a basic transformation in the world system that had developed and persisted over some five centuries. In the earlier system, although there certainly were rivalries and no small amount of interregional conflict, the overall pattern of trade involved a large number of players whose power was relatively equal. No single participant in the thirteenth- and early fourteenth-century world system dominated the whole, and most participants (with the exception of the Mongols) benefited from coexistence and mutual tolerance. Individual rulers did jealously seek to control the terms of trade and the 'foreign trad-

The strategic rhetorical linkages between *ius naturale*, *mare liberum* and *bellum iustum* establish the contours of the textual re-presentation of the preliminary stage of the Capitalist World-Economy. The exclusion of maritime *imperium* and *dominium* through the mediating device of *mare liberum* permits the untrammelled operation of *ius naturale* as the foundational principle of *bellum iustum* within juridically 'empty' oceanic spaces, discursively 'policed' by two sets of antinomies, Privateer/Pirate and European/Indian. These, in turn, are sub-divided into four sub-sets: Portuguese/Infidel; Portuguese/Pirate; Indian/European; Indian/Infidel. Astonishingly, the radical iterability of *De Indis* yields a discursive formation that explicitly rejects the dichotomous relation between Europe/Self and Asia/Other assumed by orthodox colonialist discourse. The identity of the Portuguese is not determined by their essential(ist) characteristics as a Sovereign, but, contra Realism, by their strategic location within a discursive matrix that textually traces the material contours of the World-Economy. Finally, within the emergent 'privatised' international regime, it would be the Corporate Sovereign of the VOC and not the 'public' Dutch State that would effect the final disposition of Indigenous peoples.

II The Corporate Sovereign as 'Pariah Entrepreneur': The Protection Industry

The Grotian conflation of Universal Justice with Commutative Justice paves the way for the possibility of a globalist application of private—or '*privatised*'—violence, fully consistent with Corporate Sovereignty. As indicated in Chapter Six, the primary task of *De Indis* is 'to show that private trading companies were as entitled to make war as were the traditional sovereigns of Europe.'²⁸ The doctrinal problem confronting Grotius at the time of textual composition was the dramatic alteration of Dutch privateering policy, the seizure of the *Santa Catarina* marking an irrevocable shift away from orthodox—and legitimate—self-defence to more legally and morally ambivalent forms of armed aggression;²⁹ invariably

ers' in their own ports and inland centres, but the ambition to dominate the entire system seemed beyond their needs and aspirations (and probably their capacities). The change in the 'rules of the game' introduced by the European newcomers in the sixteenth century, therefore, caught the older players off guard.

Janet L. Abu-Lughod, *Before European Hegemony: The World-System A.D. 1250–1350* (Oxford: Oxford University Press, 1989), 361–2.

28 Richard Tuck, *The Rights of War and Peace: Political Thought and International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999), 85. There is a complex alliteration at work, the substitution of the title *De Indis* for *De Jure Praedae* signifying an equivalence between colonialism and maritime predation; within this discursive framework, the 'Pirate' and the 'Indian/Infidel' are invested with meta-analogical significance, if not actual identities.

29 In economic terms, the policy shift towards aggressive maritime predation may have constituted an effort to secure a new source of

protection rent even if only negatively through the displacement of higher protection costs to the Portuguese. There are some protection costs which are obviously defen-

'privateering wars prolonged the functional association between war and commerce.'³⁰ In a remarkably brutal passage, Grotius clearly frames the legal issue in terms of hegemony.

A situation has arisen that is truly novel, and scarcely credible to foreign observers, namely: that those men who have been so long at war with the Spaniards and who have furthermore suffered the most grievous personal injuries,³¹ are debating as to whether or not, in a just war *and* with public authorization,³² they can rightfully despoil an exceedingly cruel enemy who has already violated the rules of international commerce. Thus we find that a considerable number of Hollanders³³... are apparently ashamed to lay claim to the spoils of war, being moved forsooth, by compassion for those who in their own relations with the Dutch have failed to observe even the legal rights of enemies!³⁴ Since this state of affairs is due partly to the malicious falsehoods of certain persons insufficiently devoted to the commonwealth, partly to the scruples and somewhat superstitious self-restraint of other individuals, it has seemed expedient that we should undertake to enlighten the artless innocence of the later while combating the malice of the former... If the Dutch cease to harass the Spanish blockaders of the sea (which will certainly be the outcome if their efforts result only in profitless peril), the savage insolence of the Iberian peoples will swell to immeasurable proportions, the shores of the whole world will soon be blocked off, and all commerce with Asia will collapse—that commerce by which (as the Dutch know, nor is the enemy ignorant of the fact) the wealth of our state is chiefly if not entirely sustained.³⁵

From an international legal perspective, the problem was that the Portuguese regarded the Dutch privateers as pirates; juridically, they were both brigands in unlawful rebellion against Spain and 'outlaws' within the exclusionary terms of the Treaty of Tordesillas. Similarly, the Spanish regarded all English vessels entering the West Indies as 'piratical', in terms of *mare clausum*.³⁶ The under-ap-

sive—such as the cost of convoys to ward off pirates; others—such as the cost of capturing ships of other nations engaged in competing enterprises—might be called offensive protection costs.

Frederic C. Lane, *Profits From Power: Readings in Protection Rent and Violence-Controlling Enterprises* (Albany: State University of New York Press, 1979), 27.

30 Anne Perotin-Dumon, 'The Pirate and the Emperor: Power and the Law on the Seas, 1450–1850', in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1990), 196–227 at 221.

31 The Arminian and Remonstrant members of Die Heeren XVII.

32 Note that the two are taken as complimentary, *not* identical positions.

33 *Not* 'Dutch'!

34 This on the basis of the Iberian view of the Dutch as pirates. See below.

35 Grotius, *De Indis*, 1–2. Emphasis added.

36 Nuala Zahediah, 'A Frugal and Prudential and Hopeful Trade: Privateering in Jamaica, 1655–89', *Journal of Imperial and Commonwealth History*, 18/2 (1990), 145–68 at 146, 156 and 160.

preciated irony at work here is that the 'barbarity' of Iberian action in the East Indies was, at least in part, attributable to the Portuguese identification of the Infidel/Muslim with the Pirate. The Portuguese labelled indigenous Malabars who attempted to obviate the restrictive *caratoza* system as the 'cossarios' ('corsair'), who were identical with the 'Malavares'.³⁷ 'Corsair', in turn, was a generic term for maritime predator that frequently proved inseparable from 'Privateer' and 'Pirate'.³⁸ The textual stratagem therefore turned on the discursive invalidation of Portugal while simultaneously symbolically validating Dutch maritime predation as a lawful mark of Corporate Sovereignty cognisable within oceanic spaces *extra commercium*. As always, the 'solution' to the dilemma lay within the rigorous application of the universal Grotian panacea of iterable Divisible Sovereignty, in conjunction with a highly selective application of minimal moral philosophy as the signature Grotian variant of 'holistic normative order', *ius naturale*, constantly shifting between ontologically 'thick' and 'thin' variants.

The political and economic realities of the early 17th century served as sufficient grounds for legitimising the status of the VOC as an autonomous military force.³⁹

The VOC... was a pure member's combine and remained remarkably true throughout the two centuries of its existence to its universal ideals, though these would imply military actions to reinforce the quest for a monopoly so dear to the post-medieval and mercantilist [i.e., 'early' Capitalist] mentality. Armed merchantmen were not considered at all unusual in the European Middle Ages and Renaissance, and in both their charters, the Dutch and English companies had the right to their own armed forces, which today is the exclusive prerogative of material power (leaving aside the question whether the Seven Provinces of the Dutch Republic could be called a 'nation' in this period).⁴⁰

37 M.N. Pearson, 'Corruption and Corsairs in Western India', in Peter Emmer and Femme Gaastra (eds.), *The Organization of Interoceanic Trade in European Expansion, 1450–1800* (Aldershot: Variorum, 1996), 365–91 at 373.

38 Ibid. 373–84. See Irene B. Katele, 'Captains and Corsairs: Distinguishing Protection and Aggression', in Klaus Friedland (ed.), *The Maritime Aspects of Migration* (Köln: Böhlman Verlag, 1989), 87–103, *passim*. There is considerable evidence that East Indian principalities frequently engaged in maritime actions that corresponded to contemporary European conceptions of Piracy; Rubin has pointed out that Malaysian rulers often employed naval force in enforcing local trade monopolies. Alfred P. Rubin, 'The Use of Piracy in Malayan Waters', in *Grotian Society Papers 1968. Studies in the History of the Law of Nations*, ed. C.H. Alexandrowicz (The Hague: Martinus Nijhoff, 1975), 111–35 at 122.

39 Marjolein't Hart, *The Making of the Bourgeois State: War, Politics and Finance During the Dutch Revolt* (Manchester: Manchester University Press, 1993), 187–215; William H. McNeil, *The Pursuit of Power: Technology, Armed Force, and Society Since A.D. 1000* (Chicago: University of Chicago Press, 1982), 102–16.

40 George D. Winus, and Marcus P.M. Vink, *The Merchant-Warrior Pacified: The VOC (the Dutch East India Company) and its Changing Political Economy in India* (Delhi: Oxford University Press, 1991), 9. See also Janice E. Thomson, *Mercenaries, Pirates,*

Pivotal to the hegemonic success of the VOC was the systematic internalisation of 'protective costs'; the institutional integration of military and para-military activity within the lawful scope of Company activities so as to ensure the secure transit of capital assets, 'guaranteed' or 'forced' access to new markets, and the efficient subsidisation of costs through the enforced guarantee of advantageous rates of return on capital outlays. An exact counterpart of contemporary international private security companies,⁴¹ the armed mercantile company efficiently

and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe (Princeton: Princeton University Press, 1994), 35–41, 59–67 and 97–105.

- 41 See Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder,' *Stanford Journal of International Law*, 34 (1998), 75–162, *passim*; P.W. Singer, *Corporate Warriors: The Rise of the Privatised Military Industry* (Ithaca: Cornell University Press, 2003), 3–70 and 230–42; Herbert M. Howe, 'The Privatisation of International Affairs: Global Order and the Privatisation of Security,' *Fletcher Forum of World Affairs Journal*, 22 (1988), 1–8, *passim*. Modern security companies 'resemble Italian or free companies which surged during the Italian Renaissance under similar socio-political situations' currently found within the Developing World. *Ibid.* 81. Although widely regarded as a 'shocking anachronism', the revitalisation of corporate mercenaries operates in tandem with core zone exploitation of peripheral zones; 'in most states where mercenaries were involved, there seemed to be vital economic interests at stake, usually mining and oil interests.' Zarate, 'The Emergence of a New Dog of War,' 87 and 89.

Neo-liberal programs have eroded the patrimonial state that came into being in the postcolonial period, and have subsequently invited the elites largely to abandon formal state-derived authority and prestige: to 'privatise' their activities, as it were... It is true to say that, in numerous parts of Africa at present, private companies are using their own resources to protect installations, enforce regulations, and discipline staffs on compounds little touched by local laws. Authority has become truly privatised in the most benighted parts of the continent.

Bernedeete Muthien and Ian Taylor, 'The Return of the Dogs of War? The Privatization of Security in Africa,' in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 183–99 at 184, 193 and 194. Also see Duffield cited in Singer, *Corporate Warriors*, 68: 'Wherever patterns of privatisation have evolved, all have created the demand for private protection. Indeed the one thing that has characterized the expression of global markets in unstable regions is the increasing use and sophistication of private protection to assure the control of assets.' Wallerstein locates this development in terms of the evolution of the Modern World-System:

Accumulation of capital in fact counts on the state both to guarantee economic monopolies and to repress 'anarchistic' tendencies of the dangerous classes. We are seeing today a decline in the strength of state structures everywhere in the world, which means rising insecurity and the rise of ad hoc defensive structures. Analytically, this is the road back to feudalism.

Immanuel Wallerstein, *The End of the World as We Know It: Social Science for the Twenty-First Century* (Minneapolis: University of Minnesota Press, 1999), 132. In this way, the localised 'new world disorder' fostered by the Modern World-System 'has

subsidised 'low-intensity warfare',⁴² leading directly to the institutionalised 'overlapping' of Public and Private functions.

The managers of the Company, confronted with conflicting political and economic considerations, created a new kind of balance between non-economic means and economic ends. Against the demands of the participants, the directors carried through an aggressive policy, a policy of consolidation and a policy of dividends. But they did not identify the Company with the State and they did not make the aim of the State their own. In the long run they did not forget that the Company was a privately owned business and that its owners were meant to make a profit. The result of this situation was a hybrid, neither a simple partnership for trade nor a state strategy; profit remained the ultimate aim, but under conditions which tended to make the presentation and growth of the capital as important as, or more important than, the payment of demands. At least as early as 1609, but probably already in 1606, the Heeren XVII realized that the non-economic means might be used for economic ends, and that the acts of war in the East might be turned into a profitable investment. Even if it might be a waste of time to combine the functions of soldier and merchant in one person, the Company found that it was no waste to combine economic and non-economic activities in one enterprise. The instruments of violence under the control of the Company were to some extent used for

given birth to [security companies], which act as surrogates for state power' Zarate, 'The Emergence of a New Dog of War', 81. This works to further de-legitimize the Legal Personality of the 'Peripheral' State. 'A state's 'strength' or capacity [to influence the operation of global markets] is attributable to its economic strength as well as military capacity and bureaucratic efficiency, and this is largely reflected in its position in the global hierarchy.' Muthien and Taylor, 'The Return of the Dogs of War?', 193. In numerous instances, private security firms such as Executive Outcomes have acquired majority share-holding interests in the petroleum and mining companies that they were contracted to protect.

This evolving power is, as Peter Klerks has stated, the ultimate representation of neo-liberalism: "the trend is now for private corporations to actively reach out and 'establish' governments that will then make their decisions with an eye first on corporate interests, so that instead of a country's citizens, foreign shareholders become the real basis for sovereignty." While such power is small and localized (largely to Africa) for the moment, it does represent a dangerous return to exploitative neo-colonialism and a decline in the dominance of the state in those regions, albeit 'states' that were established (often haphazardly) by the colonial powers without regard to tribes and natural divisions.

Kevin A. O'Brien, 'Privatizing Security, Privatizing War? The New Warrior Class and Regional Security', in Paul B. Rich (ed.), *Warlords in International Relations* (New York: St. Martin's Press, 1999), 52-80 at 63-4.

- 42 Defined as actions that 'occupy a grey area on the spectrum of conflict, representing a state that is neither war nor peace.' Uyeda, cited in Zarate, 'The Emergence of a New Dog of War', 81 fn. 30.

the purposes of organized plunder; they were in general used to safeguard and further economic activities, but they did not become an end in themselves.⁴³

III Erasing the Corporate Sovereign

The self-sustaining war-machine subsidised by the mercantile joint-stock company lies serves as the key to the resolution of one of the outstanding questions concerning the Grotian juvenilia: the anonymous appearance in 1609 of the only part of *De Indis* to be actually published.⁴⁴ There is no generally accepted explanation as to why *Mare Liberum*, or *The Free Sea*, was written. The most common view is that the Text was a propaganda instrument designed to improve the position of the United Provinces during the truce negotiations with Spain from 1606–1608.⁴⁵ Central to Grotius' strategy was his reliance upon Iberian Scholastics as a means of providing a series of irrebuttable propositions to the Spaniards; 'In this disputation we offer the counters to those who among the Spaniards are the principal doctors of the divine and humane law; and, to conclude, we desire the proper laws of Spain.'⁴⁶ Grotius offered a more extensive self-explication six years later in his 'Defence of Chapter V of the *Mare Liberum*'.

43 Neils Steensgaard, *Carracks, Caravans and Companies: The Structural Crisis in the European-Asian Trade in the Early 17th Century* (Denmark: Studentlitteratur, 1973), 251–52. This overlapping of functions was not accidental but deliberate.

Northern European merchant empires initially arose in close association with both war and commerce; when the two elements were combined in a predatory and aggressive trade, it was piracy. And commerce was equally nourished when the cargo sold in homeports had been seized rather than bought. Violence then was not a trait of piracy but more broadly of the commerce of that age. Commercial profits were linked pragmatically to considerations of war and aggression, though at the same time the state could be expected to put protective formations in place, like convoys that became a regular practice in the seventeenth century.

Perotin-Dumon, 'The Pirate and the Emperor', 201–2. Precisely to the degree that the 'private' Company could fulfil the necessary service of 'protection provider' was it legitimately invested with Original Personality.

44 See Eric Wilson, 'Erasing the Corporate Sovereign: Inter-Textuality and an Alternative Explanation for the Publication of Hugo Grotius' *Mare Liberum* (1609)', *Itinerario*, XXX/2 (2006), 78–103, *passim*.

45 Peter Borschberg, 'Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting *Mare Liberum* (1609)', *Itinerario* 29/3 (2005), 31–53. Also see Martine Julie van Ittersum, 'Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615', Ph.D. thesis (Harvard University, 2002), 321–31. '*Mare Liberum* served to legitimise the continuation of the war in the East Indies during the Twelve Years' Truce, something that Grotius and the VOC directors had expected (and hoped for) all along.' *Ibid.* 327.

46 Hugo Grotius, *The Free Sea*, trans. Richard Hakluyt, ed. with Introduction by David Armitage (Indianapolis: Liberty Fund, 2004), 7.

A few years ago, when I saw that the commerce with that India which is called East was of great importance for the safety of our country and it was quite clear that this commerce could not be maintained without arms while the Portuguese were opposing it through violence and trickery, I gave my attention to stirring up the minds of our fellow-countrymen to guard bravely what had been felicitiously begun, putting before their eyes the justice and equity of the case itself, whence I thought was derived 'the confidence' traditional with the ancients. Therefore, the universal laws of war and the prize [the *Prolegomena*], and the story of the dire and cruel deeds perpetrated by the Portuguese upon our fellow-countrymen [the *Historica*], and many other things pertaining to this subject, I treated in a rather long *Commentary* which *up to the present I have refrained from publishing*.⁴⁷ But when, a short time thereafter, some hope for peace or truce with our country was extended by the Spaniards, but with an unjust condition demanded by them, namely, *that we refrain from commerce with India*, a part of that *Commentary*, in which it was shown that this demand rested neither upon law nor any probable colour of law, I determined to publish separately under the title *Mare Liberum*, with the intention and hope that I might encourage our countrymen not to withdraw a title from their manifest right and might find out whether it were possible to induce the Spaniards to treat the case a little more leniently, after it had been deprived not only of its strongest argument but also of the authority of their own people.⁴⁸

Yet, a critical inter-textual reading of the *Free Sea* with *De Indis* yields clear evidence for an alternative but under-appreciated explanation that situates the composition of *Mare Liberum* within the contours of the political relationship that existed between Grotius and the *Advocaat van den Lande* Oldenbarnevelt.⁴⁹

The critical factors at work were the core Iberian pre-conditions raised during the aristic negotiations of 1608–9 for Spanish *de jure* recognition of Dutch national sovereignty: these included Dutch withdrawal from the East Indian trade; the abortion of the Dutch West Indies Company (WIC); and, most controversially, the dissolution of the Dutch East Indies Company (VOC).⁵⁰ Somewhat surprisingly, Oldenbarnevelt was prepared to countenance all of these demands, withdrawing his support from the imminent incorporation of the WIC.

47 The reasons remain unexplained.

48 Hugo Grotius, 'Defence of Chapter V of the *Mare Liberum*', in *Some Less Known Works of Hugo Grotius*, ed. Herbert F. Wright (Leiden: Brill, 1928), 177–8. Emphases added.

49 J.L. Price, *Holland and the Dutch Republic in the Seventeenth Century: The Politics of Particularism* (Oxford: Oxford University Press, 1994), 111, 125, 129–31 and 152.

50 Jonathan I. Israel, *The Dutch Republic and the Hispanic World 1606–1661* (Oxford: Clarendon Press, 1982), 1–65; Jonathan I. Israel, *The Dutch Republic: Its Rise, Greatness and Fall, 1477–1800* (Oxford: Oxford University Press, 1998), 401–2; Jan den Tex, *Oldenbarnevelt*, 2 vols, ii (Cambridge: Cambridge University Press, 1973), 405–6 and 412.

Oldenbarnevelt, for his part, had been left in no doubt that the price of a full peace with Spain, ensuring the permanency and security of the Republic among the states of Europe, was the sacrifice of the Dutch ambitions in the Indies... [he also] evidently believed that withdrawal from the Indies was a sacrifice worth making for the sake of a full peace with Spain and secure internationally recognized borders.⁵¹

To undercut oligarchic resistance and as a way of 'reassuring the 'East India interest' that the Republic would continue to reject the Spanish/Portuguese monopoly,'⁵² Oldenbarnevelt personally ordered Grotius, recently appointed *Advocaat fiscal* of Holland, to publish C.XII of *De Indis* separately as *Mare Liberum*.⁵³ In simple terms, Oldenbarnevelt gave Grotius the task of providing a natural law-derived justification of global free trade—*liberum commercium*—self-consciously designed to operate in the *absence* of the joint-stock company incorporated under municipal, or 'positive,' law.

Grotius' task was eased somewhat by the intense factionalism surrounding the VOC; in popular opinion, the Amsterdam regent-dominated VOC had become identified with the 'war party,' which was steadily losing ground to the populist 'peace party'.⁵⁴ By 1606, it had become increasingly difficult for the oligarchic

51 Israel, *The Dutch Republic and the Hispanic World 1606–1661*, 6.

52 C.G. Roelofsen, 'Grotius and the International Politics of the Seventeenth Century', in Hedley Bull et al. (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 109.

53 Den Tex, *Oldenbarnevelt*, ii, 386. Yet, it was also the case that in November 1608 the Zeeland directorate of the VOC wrote to Grotius requesting a pamphlet to be prepared by him in defence of their interests during the tension racked Armistice negotiations of 1608–9. This would signify that either Grotius was independently representing the interests of two political groupings—the Advocate of Holland and Jan Company—or that there was in fact a substantial degree of overlap of political objectives. Van Ittersum, 'Profit and Principle', 326.

54 Israel, *The Dutch Republic and the Hispanic World 1606–1661*, 19–21. For an extensive overview, see Van Ittersum, 'Profit and Principle', 189–358. Van Ittersum herself believes that the VOC, although similar to in some respects, was never at one with the Orangist/Calvinist dominated 'war party.' Ibid. 318–21. The main grounds of similarity between the two were the desire not to lose access to the East Indian trade and to establish the legality of waging *ius bellum* against the Portuguese if necessary in defence of the 'rights' of the Dutch; hence the central importance of the Zeeland chamber of the VOC for the composition and publication of *Mare Liberum*. 'The province of Zeeland had become the bastion of the war party.' Ibid. 332; see also ibid. 331–40. It is extremely interesting in this regard to note a comment made to Grotius at this time by the Zeelander Johan Boreel, the eldest son of VOC director Jacob Boreel. In a letter dated 13 December 1608, Boreel, who had already been provided with a copy of C. XII of *De Indis* by Grotius, requested that the Author send him the final version of the commissioned text; in this letter, Boreel refers to Grotius' manuscript as 'your *Indica*.' Ibid. 339. Van Ittersum declares that '*Mare Liberum* was never intended to be just a little treatise 'on the right of free navigation in the Indies,' but a flaming indictment of 'the injustice of the Spaniards.' Ibid. 339. Even though 'the

Company to portray itself effectively as the supra-factional vanguard of the Dutch national interest; 'Many Dutchmen apparently grasped that the resistance to the truce emanated predominantly from the handful of towns heavily involved in colonial enterprise, perceiving that the interests of the relatively restricted groups in some respect ran counter to the interests of the vast majority, including most merchants and seamen.'⁵⁵ As Wallerstein has rightly noted

One wonders whether the overall century-long negative balance of the VOC did not mask a gigantic process of internal transfer of income and concentration of capital *within* the United Provinces, from the small investors to the big. If so, the VOC could be said to have functioned as a kind of stock exchange, very useful for those with superior access to information, such as *De Heeren Zeventien* themselves.⁵⁶

The time was ripe, therefore, to contemplate the hitherto unthinkable: the conduct of Dutch global trade outside of the juro-political framework of the Corporation.⁵⁷ Oldenbarnevelt 'evidently expected that the gains in the European trade would eventually outweigh the losses and frustration of colonial trade and this was a perfectly logical expectation.'⁵⁸

The Iberians were clearly aware of the war-making/state-building capacity of the Corporate Sovereign; the dissolution of both the WIC and the VOC were Spanish preconditions for the Armistice of 1609,⁵⁹ marking the *de facto* end of the Dutch Revolt. Strikingly, Oldenbarnevelt appeared willing to comply;⁶⁰ although

enemy' re-presented in *The Free Sea* are the Portuguese rather than the Spanish, we can agree with van Ittersum's sentiments; this would re-locate Grotius' discussion 'Concerning the Indies'—'*Indica*'—within the broader parameters of the emergent inter-state system.

55 Israel, *The Dutch Republic and the Hispanic World 1606–1661*, 35.

56 Immanuel Wallerstein, *The Modern World System I: Capitalist Agriculture and the Origins of the European World-Economy, 1600–1750* (New York: Academic Press, 1974), 49.

57 Israel, *The Dutch Republic and the Hispanic World 1606–1661*, 6–7.

58 Ibid. 20.

59 Ibid. 33:

[One] main strategic argument on the Spanish side, and one that well illustrates the interaction of events in Asia and the Americas with those in Europe, the global view that predominated in the minds of Philip's ministers, was that if left in peace, at home, the Dutch would inevitably have all the greater means and opportunity to make additional gains in the Indies.

60 Ibid. 6:

Oldenbarnevelt, for his part, had been left in no doubt that the price of a full peace with Spain, ensuring the permanency and security of the Republic among the states of Europe, was the sacrifice of the Dutch ambitions in the Indies... [he also] evidently believed that withdrawal from the Indies was a sacrifice worth making for the sake of a full peace with Spain and secure internationally recognized borders.

he was able to move against the nascent WIC,⁶¹ popular support for the VOC as both a commercial and 'national' enterprise ultimately forced him to relent.⁶² The bitter factional dispute over the Spanish Truce that erupted in 1607 may ultimately explain the composition of *De Indis*. As a prominent member of the anti-Truce faction,⁶³ Grotius may have felt the need to legitimise the existence of the Company precisely in terms of its war-making dimensions.⁶⁴ Conversely, the debate would appear to explain the separate publication of the C. XII: van Oldenbarnevelt himself ordered Grotius to publish *Mare Liberum* as a way of 'reassuring the 'East India interest' that the Republic would continue to reject the Spanish/Portuguese monopoly.'⁶⁵

It is widely held that *Mare Liberum* is essentially a miniature replication of *De Indis*; Verijl's opinion that C. XII of *De Indis* 'was to all intents and purposes identical with the *Mare Liberum*' is typical.⁶⁶ Grotius himself re-enforces this belief by referring to a 'part of that Commentary [C.XII], in which it was shown that

61 'The project to set up a Dutch West India Company which had proceeded quite far during 1606 and was strongly supported in Zeeland and at Amsterdam, was suddenly totally frozen by Oldenbarnevelt from the beginning of 1607.' Ibid.

62 Ibid. 6–7:

Apparently, [Oldenbarnevelt] was serious also about liquidating the East India Company as his enemies within the Republic insisted in pointing out for decades later, but encountered such fierce opposition to this that he quickly dropped the scheme, though he remained adamant that the East India Company's ambitious plans for further expansion at Iberian expense in the East would have to be abandoned for the sake of a settlement with Spain.

63 The dominant anti-Truce elements included the House of Orange; the patriciates of Zeeland, Amsterdam, and the Delft; and the rank-and-file membership of the Gomarist clergy. Ibid. 30–1.

64 Ibid. 31:

While the opponents of a truce in both Spain and the Republic... consisted of coalitions of small minority groups with special interests in the war, on both sides these factions needed to present their arguments comprehensively in terms of national, strategic and religious interest. They could not afford to appear to be narrowly based or narrowly constructed.

Ironically, popular support for the Armistice may also explain why Grotius ultimately chose not to publish *De Indis*. The VOC,

while extremely active behind the scenes [during the Armistice debate], petitioning the States General, provincial assemblies, and at least some of the [urban councils], refrained from intervening in the pamphlet war, sensing no doubt that to do so, given that [the war with Spain] was not especially popular with the 'common man,' would be counter-productive.

Ibid. 30.

65 Roelofsen, 'Grotius and the International Politics of the Seventeenth Century', 109.

66 J.H.W. Verzijl et al., *International Law in Historical Perspective. Part IX-C: The Law of Maritime Prize* (Dordrecht: Martinus Nijhoff, 1992), 10–11. Van Ittersum repeats this language almost verbatim; 'the treatise is a literal copy of chapter twelve of *De Jure Praedae*'. Van Ittersum, 'Profit and Principle', 325.

this demand... that we refrain from commerce with India... rested neither upon law nor upon any probable colour of law, I determined to publish separately under the title of *Mare Liberum*.⁶⁷ This view must be modified, however, when we recall that the title of C.XII is 'Wherein it is Shown that even if the War were a Private War, it would be Just, and the Prize would be justly acquired by the Dutch East India Company'.⁶⁸ The absolute textual 'erasure' of all reference to the VOC, the primary discursive object of C.XII, constitutes the single most striking difference between the *Free Sea* and the originary Text of *De Indis*. As a Corporate Sovereign, the VOC was incorporated under the municipal law of the United Provinces, rendering it subject to the juridical discourse of Humanist 'positivism'. As the legal personality of the VOC was ultimately dependent upon the political independence of the United Provinces, the Company, as the discursive object of *De Indis*, necessitated the rhetorical prioritisation of Civic Humanism.

It is a generally accepted fact that the individuals who compose the East India Company are subject to the said Estates General. For all persons within the territory in question have pledged allegiance by oath to that assembly, or else tacitly give adequate assurance, by making themselves a part of the political community governed by the latter, of their intention to live in accordance with the customs of this community and to obey the magistrates recognized by it.⁶⁹

However, the self-conscious reformulation of the penetration of the Iberian monopoly of the Spiceries as a truly national enterprise to be conducted by private traders in the absence of the Company—the historical space occupied by *Mare Liberum*—compelled the systematic deletion of all traces of the substantive content of *De Indis*, resulting in the suspension of all discussion of Private versus Public War. In *De Indis* we read

Although... this conflict could have been waged as a private war, and a just one, too, it is nonetheless more accurate to say that in actual fact it is a public war and that the prize in question was acquired in accordance with public law, the author of the conflict being, in reality, the States Assembly of Holland, now allied with the other Provinces of the Low Countries.⁷⁰

By contrast, in *Mare Liberum* we find the following.

Our purpose is shortly and clearly to demonstrate that it is lawful for the Hollanders, that is the subjects of the confederate states of the Low Countries, to sail to the Indians as they do and entertain traffic with them. We will lay this certain rule of the law of

67 Grotius, 'Defence of Chapter V of the *Mare Liberum*', 177.

68 Grotius, *De Indis*, 216–82.

69 Ibid. 296.

70 Ibid. 283.

nations (which they call primary) as the foundation, the reason whereof is clear and immutable: that it is lawful for any nation to go to any other and to trade with it.⁷¹

The rhetorical challenge confronting Grotius was that the textual 'absence' of the VOC compelled a shift in juridical discourse away from a Company with a positive legal personality to the Natural Person or private individual now governed *exclusively* by the Scholastic variant of *ius naturale*. The emphasis upon the inalienable and immutable rights of natural persons necessitated a wholesale shift from Civic Humanism towards Late Scholasticism, the legitimacy of this intellectual re-orientation underpinned by the parallel shift between the two Texts in the identity of the discursive object, the Company replaced with the natural person.

There is also no generally accepted explanation as to why Grotius published *Mare Liberum* anonymously. His own account is hardly convincing: 'To this little book I had refrained from signing my name, because it seemed to me to be safe, like a painter skulking behind his easel, to find out the judgements of others and to consider more carefully anything that might be published to the contrary.'⁷² Borschberg's recent attempt is similarly unconvincing: 'The *Mare Liberum* was published by Grotius anonymously and probably for a good reason. Many of the points he raises were not so much unorthodox as they were hardly accepted by his contemporaries and deeply eclectic in nature and imitation.'⁷³ As has been shown, the *Free Sea* is 'un-eclectically' Scholastic, although, admittedly, given the extreme sectionalism surrounding the armistice debate, such express reliance upon Spanish authorities may have constituted a politically calculated risk.

The most likely explanation lies with Grotius' shadowy relationship with Oldenbarnevelt and the extreme factionalism centred upon the VOC at this time. I would argue that the interpretative key to *Mare Liberum*, if not the entirety of the

71 Hugo Grotius, [*Mare Liberum*] *The Freedom of the High Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, trans. Ralph van Deman Magoffin, ed. James Brown Scott (New York: Arno Press, 1972), 10.

72 Grotius, 'Defense of Chapter V of the *Mare Liberum*', 78.

73 Peter Borschberg, 'Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting *Mare Liberum* (1609)', *Itinerario* 29/3 (2005), 31–53 at 35. Van Ittersum has discussed correspondence that has survived between Grotius and the printer of *Mare Liberum*, Elzevier Publishers, indicating that it was the printer who actually omitted Grotius' name from the treatise. Even if anonymity was an accident, it proved to be a highly fortuitous one.

Mare Liberum appeared one or two weeks after the signing of the Truce treaty, and in far too 'concealed' a fashion to cause any trouble. None of the parties involved in the Truce negotiations lodged an official protest with the Dutch Estates General, for instance. Had they done so, then *Mare Liberum* could always have been disavowed by Their High Mightinesses [i.e., The Gentlemen XVII] as, quite literally, an unlicensed publication.

Van Ittersum, 'Profit and Principle', 342. In any event, it is noteworthy that Van Ittersum devotes no discussion to either Den Tex's or Israel's view on the matter of composition and publication.

'juvenilia' is Grotius' fluctuating political relationship with Oldenbarnevelt and the convoluted double game he played as mouthpiece for contending factions. Both the Author and the Text were the sites of irreconcilable sectional interests; Grotius was personally opposed to the peace talks⁷⁴ yet he accommodated Oldenbarnevelt in publishing a Text that was both logically and rhetorically centred upon the absence of his corporate patron.

The threat of violence as a factor driving Grotius in seeking anonymity cannot be underestimated—the resultant political crisis engendered by the Twelve Year's Truce 'was the nearest the Republic ever came to civil war, and even perhaps political disintegration.'⁷⁵ Predictably, the VOC-dominated cities of Amsterdam⁷⁶ and the Delft⁷⁷ constituted the core of political opposition, but even here there was a fragmentation of purpose. The Amsterdam *vroedschap*

does appear to have been chiefly swayed in adopting its stand by colonial aspirations. At Amsterdam, the clash between European and extra-European trade was particularly evident. Innumerable merchants stood to gain handsomely from the resumption of trade with the Peninsula. But it was those who were linked to colonial enterprise who at this time carried more weight in the city council.⁷⁸

Most important to recall, it was the withdrawal of the vital political support of the Amsterdam regents that brought about the downfall and judicial murder of Oldenbarnevelt in 1618–19,⁷⁹ resulting in both van Oldenbarnevelt and Grotius being charged with treason, specifically for aborting the WIC and for having covertly negotiated with Spain.⁸⁰ This, surely, was an odd fate for an Author whose identity was 'exhausted' by the corporate interests of the VOC.

This elliptical erasure of the discursive subject as part of a rhetorical stratagem to negotiate between two separate but parallel Texts—a kind of 'double movement'—serves as a striking reminder of the various ways in which primitive modes of international juridical discourse overtly anticipate fundamental innovations in Deconstruction and Critical Legal Studies theory. The erasure of

74 Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), 164:

Connections with the Delft probably encouraged [Grotius] in his opposition to peace, for Delft and Amsterdam were the leading centres of the war party, and both were also hosts to chambers of the East India Company, which feared that peace might curtail its activities in the Spanish territories of the East.

75 Price, *Holland and the Dutch Republic in the Seventeenth Century*, 114; see also *ibid.* 100 and 113–16. Also, Jonathan I. Israel, *The Dutch Primacy in World Trade* (Oxford: Oxford University Press, 1982), 421–49.

76 *Ibid.* 31, 36, 40 and 41.

77 Den Tex, *Oldenbarnevelt*, ii, 663.

78 Israel, *The Dutch Republic and the Hispanic World 1606–1661*, 40.

79 Israel, *The Dutch Primacy in World Trade*, 114–15, 128, 144 and 148.

80 *Ibid.* 458–9.

the positive legal construct—the Company—obviated the rhetorical necessity of the pole of Civic Humanism; the *sub rosa* conflation of 'Company' with 'person' operating within trans-national space necessitated an exclusive reliance upon an ontologically thicker variant of *ius naturale*. In many crucial respects, Post-Structuralism could be persuasively viewed as a re-formulation of central tenets of early or 'pre'-modern thought. The Derridean 'sign' of the categorical substance of the 'self-presence' of Sovereignty is an obvious and weighty example.

Consistent with the logic of sublimation, [the modern juridical discourse of Sovereignty] places the metaphysical unity of the state in opposition to its outside, its ethical negation. The international system is marked by the absence of unity right from the start; it is pure plurality. From this opposition, everything else follows: what is listed as essential to statehood is absent in the international realm, and vice versa. The whole range of dichotomies employed in international political theory to demarcate the domestic from the international gains logical and rhetorical impact from this single ontological gesture and the systematic play of identity and difference brings into being. What makes a State a State and thus identical with itself is the difference from what is different from identity: difference.⁸¹

Grotius obviates the potentially infinite sub-divisibility of sovereignty by rhetorically moving away from Thomistic *ius naturale* and towards a humanist assertion of positive authority: 'Arguments that are used against the prince could by the same reasoning be used against other governors of the state; and this is the path to sedition.'⁸² Although republican, *De Indis* is suffused by a patrician conservatism; the discursive requirements of providing an 'apology' for a primitive Positivism is one of the main anchors for the Civic Humanist pole of the Text; this is underscored by the negative logic of the absent 'Presence' of the discursive object within the alternative Text of *Mare Liberum*. As Tanaka has noted

It is revealing that Grotius himself completely fails to consider the possibility of right becoming separated from law. In Grotius' system, municipal law which is contrary to natural law cannot have any binding force; conversely, in the domains where municipal law is competent to restrict the freedom that individual persons possessed before states were formed, it is impossible to approve of resistance or revolution to attain natural rights.⁸³

81 Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), 28–29.

82 Hugo Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, ed. with an Introduction Peter Borschberg (New York: Peter Lang, 1994), 215.

83 Tadashi Tanaka, 'Grotius' Concept of Law', in Yasuaki Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), 32–56 at 36. It is only with John Locke, in a wholly consistent neo-Thomist manner, that the assertion of lawful resistance in the defence of private *ius* on the

Throughout the history of this endlessly repetitive inversion, the monopoly of organised violence has remained the constant primary signifier of the 'non-invertible' dichotomy between lawful and unlawful types of statist formation. This has now been called into fundamental metaphysical question through the critical innovations of Deconstruction; 'To say that a state is externally sovereign is in the context of international political theory another way of saying that *it is a unity, whose indivisibility hinges on the presence of a monopoly of legitimate violence*, and which ideally speaks with one voice to its neighbours.'⁸⁴ The problem here, as discussed in Chapter Six concerning the mark(s) of Sovereignty, is that *any* agency capable of exerting effective control over organised violence is, by that fact alone, potentially eligible for legal personality. The subversive potential of this co-joining of Divisible Sovereignty and organised violence has received classic treatment by Lane in his theory of 'the protection industry'.

The use of force may be productive of a utility. That utility is protection. Every economic enterprise needs and pays for protection, protection against the destruction or armed seizure of its capital and the forceful disruption of its labour. In highly organized societies the production of this utility, protection, is one of the functions of a special association or enterprise called government. Indeed, one of the most distinctive characteristics of governments is their attempt to create law and order by using force themselves and by controlling through various means the use of force by others. The more successful a government is in monopolizing all use of force between men within a particular area, the more efficient is its maintenance of law and order. Accordingly, the production of protection is a natural monopoly. The territorial extent of this monopoly is prescribed more or less loosely by military geography and historical circumstances. Breaks in the monopoly occur, as when there is an insurrection or a boom in the rackets of gangsters, but such rival enterprises in the use of force substitute monopolies of their own if successful. These illegal monopolies may be quite transitory and highly localized... [When] no protection is given against immediate additional seizure by some bandit or some other user of violence, it is a clear case of plunder.'⁸⁵ Both the history of nations and the

individual level is finally made. John Locke, 'Second Treatise', C. II, in *Two Treatises of Government*, ed. with Introduction by Peter Laslett (Cambridge: Cambridge University Press, 1988), 269–98. See Quentin Skinner, *The Foundations of Modern Political Thought. Volume Two: The Reformation* (Cambridge: Cambridge University Press, 1978), 338; A.P. d'Entreves, *Natural Law: An Introduction to Legal Philosophy*, 2nd edn (London: Hutchinson University Library, 1970), 60–2.

84 Bartelson, *A Genealogy of Sovereignty*, 29. Emphasis added. See Anthony Giddens, *The Nation-State and Violence* (Cambridge: Polity Press, 1985), 14.

85 The critical linkage between *banditi* and *Mafiosi* is their involvement in the 'protection industry'.

Organized crime is not an anti-state, [but]... can only exist when a state exists but is ineffectual. In fact, it is only when there exists a mechanism of public protection unable to function properly that the conditions for private protection can arise. The rise of the Mafia in Sicily during the building of the Italian nation-state is clear confirmation of this... Conversely, if public protection does not even exist on paper, the mechanisms

stories of gangsters contain plenty of borderline cases, but clearly force is not only used in plundering but also in preventing plundering, and a government which maintains law and order is rendering a service in return for the payment it collects.⁸⁶

Lane's approach is radically Nominalist, the demarcation between licit and illicit organised violence wholly an exercise of taxonomic classification. The effective monopolisation of violence is not merely a derivative attribute of an 'objective' sovereignty, but the primary signification of sovereignty itself, subverting any hierarchical distinction between 'Government' and 'Governance'. The 'appropriation' of public functions by Trans-National Organised Criminal Cartels (TOCCs) in Colombia,⁸⁷ Sicily,⁸⁸ and Russia⁸⁹ are outstanding empirical examples of the State as a self-legitimising 'pariah entrepreneur'⁹⁰ based upon effective provision of

are triggered that in the long term induce citizens to choose among the various private subjects competing to provide them with protection, until one of these emerges as the agent able to offer protection as a public good. Historically, this has been the process whereby public authority in nation-states has formed.

Raimondo Catanzaro, 'Violent Social Regulation: Organized Crime in the Italian South', *Social and Legal Studies*, 3 (1994), 267–79 at 270.

86 Frederic C. Lane, *Venice and History: The Collected Papers of Frederic C. Lane* (Baltimore: Johns Hopkins Press, 1966), 383–4. See also, Lane, *Profits From Power*, 1–36; Frederic C. Lane, 'Oceanic Expansion: Force and Enterprise in the Creation of Oceanic Commerce', *Journal of Economic History*, 10 (1950), 19–39, *passim*; Neils Steensgaard, 'Violence and the Rise of Capitalism: Frederic C. Lane's Theory of Protection and Tribute', *Review*, 5/2 (1981), 247–73, *passim*. In terms of the protection industry, the systematic elimination of Piracy by the State may be interpreted as a deliberate policy aimed to globally reducing transaction costs. See J.L. Anderson, 'Piracy and World History: An Economic Perspective on Maritime Predation', *Journal of World History*, 6/2 (1995), 175–99, *passim*.

87 Simon Strong, *Whitewash: Pablo Escobar and the Cocaine Wars* (London: Pan Books, 1995), 6, 43–8, 82–4, 114–15, 136, 157, 219–20 and 323–5; Castells, *End of the Millennium*, 190–201.

88 Catanzaro, 'Violent Social Regulation' *passim*; Vincent Ruggiero, 'Organized Crime in Italy: Testing Alternative Definitions', *Social and Legal Studies*, 2 (1993), 131–48, *passim*; Diego Gambetta, 'Fragments of an Economic History of the Mafia', in Nikos Passas (ed.), *Organized Crime* (Aldershot: Dartmouth, 1995), 171–90, *passim*.

In essence, Mafiosi operate in the economic transactions and agreements where trust, while of paramount importance, is nevertheless fragile, and where it is either inefficiently supplied or cannot be supplied at all by the state: typically, in illegal transactions in otherwise legal goods, or in all transactions in illegal goods.

Gambetta, 'Fragments of an Economic History of the Mafia', 172.

89 Federico Varese, 'Is Sicily the Future of Russia? Private Protection and the Rise of the Russian Mafia', *European Journal of Sociology*, 9 (1991), 224–58, *passim*; Castells, *End of the Millennium*, 180–90.

90 Ibid. 166–205.

the commodity of protection; 'a private agent who manages to achieve monopoly over violence in a specific territory eventually becomes a public actor.'⁹¹

IV *De Rebus Belgicis* and the Juridical Nomad

Within the early Modern World-System, the logic of the dangerous supplement subverting the metaphysical hierarchy between Government and Organised Crime operates on both the micro-level of the State and the macro-level of the World-Economy.⁹² Within the micro-level of the United Provinces, the Dutch Revolt, premised upon a popular application of radical Calvinist/Huguenot Resistance Theory threatened to politically fracture the Dutch patriciate; the 'political thought of Dutch Reformed Protestants was revolutionary primarily because it extended the spectrum of individual rights as developed until the Reformation. In the minimal formulation of the private person was awarded the right of freedom of conscience and, if the government ordered against God, of disobedience.'⁹³

Within the 'public' domain, the 'danger' of Gomarist Natural Law theory was two-fold. In theo-political terms, the Conciliarist origins of radical Resistance Theory⁹⁴ promised an unlimited sub-division of sovereignty. In socio-political terms, the proletarian origins of the Calvinists threatened a wider social revolt, politically subversive paramilitary units fomenting popular secession. The

91 Catanzaro, 'Violent Social Regulation', 270.

92 The macro-level consideration of Privateering/Piracy as anti-systemic movement will be discussed below.

93 Martin van Gelderen, *The Political Thought of the Dutch Revolt 1555–1590* (Cambridge: Cambridge University Press, 1985), 262; see *ibid.* 62–109. Also, see Robert M. Kingdon, 'Calvinism and Resistance Theory, 1550–1580', in J.H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (Cambridge: Cambridge University Press, 2001), 193–218, *passim*. In terms of Deconstruction, the politically mobilizing issue of 'true piety' serves as a signifier of 'social justice' governed by the meta-normative master-sign of Providence. 'It was through theology that the cause of revolution was defended, in conjunction with other causal factors; and it was largely through the reassessment of the religious responsibilities of the body politic that Calvinists made their grievances explicit.' Carlos M.N. Eire, *War Against the Idols: The Reformation of Worship From Erasmus to Calvin* (Cambridge: Cambridge University Press, 1991), 309. 'Calvinism was in many ways a revolutionary religious organization... [providing] the kind of justification for political resistance that could be extended rather easily to include all kinds of popular uprisings against oppressive governments.' Linder, cited in *ibid.* 294–5.

94 'So far from breaking away from the constraints of Scholasticism to found a 'new politics,' we find the Huguenots largely adopting and consolidating a position which the more radical [neo-Realist] jurists and theologians had already espoused.' Skinner, *The Foundations of Modern Political Thought. Volume Two: The Reformation*, 323; see *ibid.* 318–23, 334–5 and 338–48.

example of the 'Sea-Beggars' (*Watergeuzen*) is illustrative.⁹⁵ A viciously effective paramilitary marine/amphibious force recruited from the 'dangerous classes'⁹⁶ of the Calvinist maritime proletariat and 'legitimised' by an 'official' letter of marque issued by the House of Orange, the Sea-Beggars practised Lane's 'natural monopoly' of violence through shifting from Privateering to Piracy as a means of subsidising the costs of military resistance. Herein we witness the 'dangerous' migration from political to military to criminal organisation, an outstanding sixteenth-century example of the convergence between wars of national liberation and trans-national 'black markets'.

In the summer of 1569 [William of] Orange hired some new warships in England in order to form a new war-fleet, but again after a short time the captains he appointed turned to piracy. Since Orange was unable to pay [the Sea-Beggars] an adequate wage, they had no alternative other than to support themselves by plundering merchant shipping. It was here that the consistories came in. The Dutch colonies of refugees in England provided an ideal market for the prizes taken by the Beggars, and they very soon became the centres of a highly profitable efficient distribution network.⁹⁷

Appropriately enough, it was these very 'pirates' who guaranteed the success of the first phase of the Revolt by seizing the port-city of Brill on 1 April 1572.⁹⁸

The Company's 'conflicted attitude' towards the juridical nomads in its employ is clearly on display in Grotius' own account of the *Watergeuzen*, provided in his *De rebus Belgicis* (1601–12), alternatively titled *The Annals and History of the Low-Countries War*. A thoroughly Humanist work,⁹⁹ *De rebus Belgicis* is committed to both unitary *civitas* as political discourse and to a perennial mistrust of the 'dangerous classes' on the basis of class bias. What makes Grotius' treatment of the Sea-Beggars so interesting is the manner in which their latent criminality exists in such a clearly unstable manner with the Author's wider nationalistic narrative. Grotius begins his discussion with a high degree of historical objectivity. William the Silent, the Prince of Orange (1533–84), begins recruiting a maritime force through proclaiming sovereign authority.

[E]ither by embassies or letters, [the Prince] promised to the banished Netherlanders resettlement in their own country and to those that are oppressed at home, liberty; and

95 Geoffrey Parker, *The Dutch Revolt*, rev. edn (Harmondsworth: Penguin Books, 2002), 109–10, 121–6, 129, 131–5 and 148–9.

96 Wallerstein, *The End of the World as We Know It*, 144–48. Here self-consciously deployed as an historicist neo-logism; the 'dangerous classes' was a 'concept that came into existence precisely in the early nineteenth century to describe persons and groups who had neither power, nor authority, nor social prestige, but were making political claims nonetheless.' Ibid. 145.

97 Parker, *The Dutch Revolt*, 121.

98 Ibid. 131–5.

99 Van Ittersum, 'Profit and Principle', 492 fn. 2.

[the Prince did] persuade many governors of cities, either to mutiny or revolt, no valuing either the force, fear or hate of [the Duke of] Alva.¹⁰⁰ Thus relying on his strength, and the industry of his People, he made a good force at sea; for every banished Netherlander who had any courage, and all those more indignant people who were afraid of banishment, got aboard into some kind of ship, and taking others, which they met, by force from their owners, they much increased their number, they hovered to and fro again upon the coast, and not only there, but even in the very Ocean, or High Seas, as *Pirates*, got their living, by robbery all they could seize on.¹⁰¹

The de-notation of William's drafted forces as Pirates introduces an interesting element. On the one hand, the absence of the Scholastically derived construct of Divisible Sovereignty prevents Grotius from investing the Prince with full sovereign authority, although he has ample opportunity to do so: 'The Prince of Orange had the show of authority and command over this violent multitude (though indeed, there was neither civility nor Government among them) by letters missive, and the like, authorizing them as by commission.'¹⁰² Consequently, 'the freedom fighters,' owing to the uncertain lawfulness of the Prince's actions, can only remain as Pirates; ever the jurist, Grotius is obliged to continue his portrait in extremely unflattering terms: 'The admiral of this fleet, William Count Marque, surnamed Lumey,¹⁰³ of a disposition that rather inclined to cruelty than courage, which was accounted his chief virtue, his counsel to most of his companions and followers, as well as his own mind, intended nothing but depredations.'¹⁰⁴ Unlike the respectable but feckless *regenten*, it was this motley group of ambiguous legal identity—Pirates sent by a Prince—that managed to initiate a full-scale war of national liberation.

1572. Twenty four indifferent ships being commanded off the English coasts, sail towards West Friesland, to try their fortune in beginning a war against the chief potentate of Christendom; but the wind being against them, drove them through an extreme scarcity of necessities, on one of the biggest isles, they call it Vorne, and there is the mouth of the river Maze, where the soldiers and seamen between fear and courage, with a sudden fury set upon the town of Brill; not that they intended to make any long stay there, but only intended it as a place of refreshment for a few days. But the more prudent of them, together with the convenience of the place, desired that they might become sensible of their victory in the retention of the place.¹⁰⁵

100 Ferdinand Alvarez de Toledo, the third Duke of Alva (1507–1582).

101 Hugo Grotius, *De rebus Belgicis: or, the Annals and History of the Low-Country-War* (London: Henry Twyford, 1665), 60.

102 Ibid.

103 Lumey de la Marck, a nobleman from Liege. Henry Kamen, *The Duke of Alba* (New Haven: Yale University Press, 2004), 103.

104 Grotius, *De rebus Belgicis*, 60–1.

105 Ibid. 61.

The (temporary) occupation of Brill triggers a wider war that is, crucially for the Dutch, determined by maritime force.

Now there began to be daily fights both at sea and land; wherein, as to the land fights on foot, the Spaniard was too hard for the other, being rude yet undisciplined, but at sea was not able to meet, for it was their proper sphere in which they were born. The Zeelanders, in these parts, got many notable victories thereby, and by their depredations at sea, relieving the public wants.¹⁰⁶

Now comes the most interesting part of Grotius' account: the inevitable retaliation by Alva. Fully consistent with Civic Humanism, Alva chooses to interpret the Sea-Beggars neither as Privateers nor as lawful combatants, but as Pirates who are identical with rebels.

Alva not at all moved with these dangers, was as outrageous as ever, and would look upon [the *Watergeuzen*] as [lawful] enemies, nor take any notice of their strength; but when at any time he got any into his power, *he exercised his malice upon them, as upon rebels*. And now revenge, and a like cruelty, raged upon all prisoners on both sides without difference; so long as mutual necessity, which of old had taught people who were enemies, made them also know, that to spare the shedding of blood was not available to the finishing of war. Being now thus well acquainted at hand, with the use of arms, the Naussians courageously kept position of the sea: a breathing space is given to Holland and Zeeland, whereby they might unite the stronger.¹⁰⁷

One can almost detect the sense of the relief of the *regenten* Author that the 'dangerous classes' have fulfilled their 'historical mission' and incited the 'un-dangerous' classes to become involved in the fighting-and to provide the requisite oligarchic political leadership.

The complex but important inter-relationship between Pirate/Brigand and rebel will be discussed in greater detail later in this chapter. For now, it is necessary to focus on both the political and legal ambivalence generated by the central presence of the (semi-) criminalised juridical nomad within the operations of the joint-stock company. Within the 'private' domain, the Corporate Sovereignty of the VOC was threatened by an internal bifurcation; as the bearer of the 'marks of sovereignty', it was impossible for the Company to prevent the unofficial transferral of *actus summi* to 'deviant' sub-groups¹⁰⁸ within its corporate structure

106 Ibid. 63; Kamen, *The Duke of Alba*, 103–4.

107 Grotius, *De rebus Belgicis*, 63.

108 G.V. Scammell, 'European Exiles, Renegades and Outlaws and the Maritime Economy of Asia c. 1500–1750', *Modern Asia Studies*, 26 (1992), 641–61, *passim*; Maria Augusta Lima Cruz, 'Exiles and Renegades in Early Sixteenth Century Portuguese Trade', *Indian Economic and Social History Review*, 22 (1986), 249–62, *passim*; C.H. Boxer, *The Portuguese Seaborne Empire 1415–1825* (Harmondsworth: Penguin Books, 1969), 296–339.

engaged in acts of 'economic insurgency'.¹⁰⁹ Viewed as 'illicit enterprise',¹¹⁰ the sub-division of Corporate Sovereignty constituted two parallel para-political networks extending throughout the whole of the Indian Ocean world system: a 'Shadow Empire'¹¹¹ of informal patronage systems and an underground economy

- 109 Many historians have regarded the endemic corruption of the VOC as a primary cause of the Company's long-term decline. R.J. Barendse, *The Arabian Seas: The Indian Ocean World of the Seventeenth Century* (London: M.E. Sharpe, 2002), 415–16. 'The VOC's success was to no small extent achieved because of the secrecy of its affairs and its decentralization at home—either of which could with hindsight appear as weaknesses.' Ibid. 416. The economic transgressions of the VOC are strongly reminiscent of contemporary trends.

Illicit wealth is dangerous because it is cumulative. With higher rates of return, it grows faster than legal. Because it is associated with the de-legitimation of the state and the discrediting of the prevailing distribution of legal income and wealth in the eyes of citizens, underground accumulation can go hand in hand with the general breakdown of social cohesion and the spread of more predatory forms of economic behaviour. Legitimate wealth will then tend to imitate its behaviour—seeking out higher rates of return in the underground economy and stashing surpluses in short term, anonymous and speculative assets rather than in long term productive investment.

R.T. Naylor, 'From Underworld to Underground: Enterprise Crime, Informal Sector Business and the Public Policy Response', *Crime, Law & Social Change*, 24 (1996), 79–150 at 140. The dawning recognition of the iterability between official and underground economies marks a comparative 'deconstructive turn' in Criminology.

The notion that legitimate markets shape the way in which illicit goods are simultaneously marketed found it very hard, and perhaps still does not gain currency. Admitting to such a close connection between legitimate and illegitimate commercial undertakings amounts, in some quarters, to acknowledging that economic development brings, along with wealth and social opportunities, parallel opportunities for the acquisition of illegally produced wealth.

Vincenzo Ruggerio, 'Global Markets and Crime', in Margaret Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption* (Toronto: University of Toronto Press, 2003), 171–82 at 171.

- 110 Defined as

the extension of legitimate market activities into areas normally proscribed for the pursuit of profit and in response to latent illicit demand. In this context, the loan shark is an entrepreneur in the banking industry; the drug or cigarette smuggler is a wholesaler and the fence a retailer; and the bribe-taker is a power broker.

Dwight C. Smith, 'Organized Crime and Entrepreneurship', *International Journal of Criminology and Penology*, 6 (1978), 161–77 at 164. See Mark H. Haller, 'Illegal Enterprises: A Theoretical and Historical Interpretation', in Nikos Passas (ed.), *Organized Crime* (Aldershot: Dartmouth, 1995), 225–54, *passim*; Ruggerio, 'Global Markets and Crime', *passim*.

- 111 George D. Winius, 'The 'Shadow Empire' of Goa in the Bay of Bengal', *Itinerario*, 7 (1983), 83–101, *passim*; R.J. Barendse, *The Arabian Seas: The Indian Ocean World of the Seventeenth Century* (London: M.E. Sharpe, 2002), 333–6 and 400–10.

of 'Private Trade',¹¹² centred around contraband¹¹³ and fraudulent book-keeping.¹¹⁴ Both constitute a striking seventeenth-century confirmation of the 'Smith thesis'¹¹⁵ of the interconnection of white-collar pariah entrepreneurialism and organised crime. The unregulated permutation of illicit enterprise constituted an objective threat to the geo-governance of the regional world system, as the episodic 're-criminalisation' of contraband proved both materially and taxonomically inseparable from the proliferation of Piracy. 'Coasting trade and smuggling existed in a symbiotic relationship; exclusive trade and the one with foreign entrepôts de facto existed at the local level.'¹¹⁶ For Perotin-Dumon

The chronic fragility of European trade monopolies was never more obvious than when piracy periodically resurfaced, when a policy of control called previous tolerance into question. Suddenly the equilibrium between exclusion and permeability would be shattered because one of the two sides had gone too far: either a state had imposed an exorbitant control that killed illegal but necessary alternatives;¹¹⁷ or contraband had developed into a fully-fledged counter-system that evidently threatened official trade...

112 Ibid. 460–86. The same held true for the English East India Company. See P.J. Marshall, 'Private British Trade in the Indian Ocean Before 1800', in Om Prakash (ed.), *European Commercial Expansion in Early Modern Asia* (London: Variorum, 1997), 237–61, *passim*.

113 Ibid. 405–6; C.H. Boxer, *The Dutch Seaborne Empire 1600–1800* (Harmondsworth: Penguin Books, 1965), 23–4, 100–3 and 225–30. Smuggling 'became a way of life that linked the merchants of the core countries to the producers of peripheral countries they did not directly control'. Immanuel Wallerstein, *The Modern World-System II: Mercantilism and the Consolidation of the European World-Economy, 1600–1750* (New York: Academic Press, 1980), 160.

114 Barendse, *The Arabian Seas*, 403–4.

115 For Smith, organized crime represents 'in virtually every instance an extension of a legitimate market spectrum into areas normally proscribed... [it derives] from the same fundamental considerations that govern entrepreneurship in the legitimate marketplace: a necessity to maintain and extend one's share of the market.' Smith, 'Organized Crime and Entrepreneurship', 164. See also Dwight C. Smith, 'Paragons, Pariahs, and Pirates: A Spectrum-Based Theory of Enterprise', in Nikos Passas (ed.), *Organized Crime* (Aldershot: Dartmouth, 1995), 127–56, *passim*; Dwight C. Smith, 'White-Collar Crime, Organized Crime, and the Business Establishment: Resolving a Crisis in Criminological Theory', in Peter Wickam and Timothy Dailey (eds), *White-Collar and Economic Crime* (Lexington: D.C. Heath, 1982), 23–37, *passim*; R.T. Naylor, 'Mafias, Myths, and Markets: On the Theory and Practice of Enterprise Crime', *Transnational Organized Crime*, 3 (1997), 1–45, *passim*.

116 Perotin-Dumon, 'The Pirate and the Emperor', 223.

117 Alfred P. Rubin, *The Law of Piracy*, 2nd edn (New York: Transnational Publishers, 1998), 22

For the pattern of commerce to be profitable the goods must continue to flow; the taxation or belligerent interdiction (or robbery) must not be so burdensome as to drive trade away; even risk-sharing through insurance must be managed in such a way that the risk does not become so great as to be insurable.

Thus, ironically, the hegemonic nature of some merchant empires did much to keep piracy alive. As long as monopolies went along with commercial wars, piracy simply fluctuated according to the degree of a state's authority at sea. It was the linkage among trade, war, and hegemonic policies that engendered a cycle in which smuggling and piracy alternated. Enlisting European pirates into a *guerre de course* did keep them under control. To eliminate piracy as a phenomenon, however, trade monopoly had to be given up altogether.¹¹⁸

Ironically, far from resisting these trends—which would have proven impossible given the operational dominance of Late Scholasticism—Grotius integrated the phenomenon of 'deviant' Divisible Sovereignty into the discursive formation of the Text. By re-appropriating maritime predation as a form of *bellum iustum*, *De Indis* performs a critical discursive manoeuvre, locating Company activity within the broader juridical framework of minimal morality and a heteronomous World-Economy. As ontologically 'primary' Natural Society is distinct from derivative Civil Society, public order suffers from a concomitant absence of a 'strong' substantive category of 'the Good'; the sociability of Civil Order 'extended only so far as was necessary to justify the private right of punishment [*jus gladii*].'¹¹⁹ This civil requirement of private punishment/vengeance is lawfully performed by that supremely Grotian innovation, 'The Private Avenger'.

V 'The Private Avenger': The Privatisation of *Ius Bellum*

As discussed in Chapter Six, the privatisation of *iurisdictio* yields a 'Derridean pun', a double-entendre playing upon legal versus criminal 'enforcer', derived from the metaphysical inversion between *dominium* and *imperium*. The notion of the VOC as both 'public' and 'private' avenger creates an element of cognitive dissonance; it is difficult to reconcile 'primitive' violence with the bureaucratic rationality of the modern Corporation, the proliferation of international private security firms notwithstanding.¹²⁰ In similar fashion, it is counter-intuitive to accept the institutional equivalence between 'primitive' and 'rational' modes of accumulation. It is the 'thin' ontology of Corporate Sovereignty that holds the key to meaning. The Late Scholastic doctrine of *bellum iustum* is a juro-theological expression of feudal dispute resolution,¹²¹ predicated upon private warfare and lawful retaliation;¹²² 'the legality of reprisals is conditioned upon two require-

118 Perotin-Dumon, 'The Pirate and the Emperor', 225 and 226.

119 Tuck, *The Rights of War and Peace*, 88

120 Martin van Creveld, *The Transformation of War* (New York: Free Press, 1991), 192–227.

121 'Medieval legal thought was still rooted firmly in the archaic concepts [sic] of revenge. Each legal injury required revenge.' Wilhelm G. Grewe, *The Epochs of International Law* (New York: Walter de Gruyter, 2000), 70.

122 Ibid. 105–18 and 210–28.

ments: the authority of a superior and a just cause.¹²³ A crucial consideration introduced by the Grotian Text is that the authorising entity merely possesses the minimally requisite mark of sovereignty. 'It was not necessary that the war be conducted by this highest authority itself; subordinate princes and authorities could be delegated to conduct a *bellum iusticale*.'¹²⁴ In other words, it is the legal identity of the actor that determines the justness of the conflict.¹²⁵ This paradoxical assertion of *De Indis* is the logical corollary of an ascending, or apologetic, argument; it is an ontologically 'thin' Civil Order that gives rise to the 'strong' *ius* of commutative violence in the form of *bellum iustum*.

It is not the power to punish essentially a power that pertains to the state [*res publica*]? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals, and similarly, the power of the state is the result of collective agreement...Therefore, since no one is able to transfer a thing that he never possessed [re. the Treaty of Tordesillas], it is evident that the right of chastisement was held by private persons before it was held by the state. The following argument, to, has great force in this connection; the state inflicts punishment for wrongs against itself, not only upon its own subjects, but also upon foreigners; yet it denies no power over the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of the nation, is the source from which the state receives the power in question.¹²⁶

Notice how Grotius subtly conflates positive state law with *ius naturale*, an implicit weakening of the otherwise robust demarcation between 'primary' and 'secondary' *ius gentium*. The 'loose' association among rights-holders, which is Civil Society, is then re-configured as a 'Society of Vigilantes,' subject to the 'thin' onto-

123 Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law', *American Journal of International Law*, 33 (1939), 665–88 at 671.

124 Grewe, *The Epochs of International Law*, 109.

125 In an un-characteristically Nietzschean moment (for a neo-Marxist), Hobsbawm denotes a particularly nihilistic sub-group of the Bandit as the 'Avengers,' the bearers of a

wild and indiscriminate retaliation... among the weak, the permanent victims who have no hope of real victory even in their dreams, a more general 'revolution of destruction,' which tumbles the whole world in ruins, since no 'good' world seems possible... In such circumstances to assert power, any power, is itself a triumph. Killing and torture is the most primitive and personal assertion of ultimate power, and the weaker the rebel feels himself to be at bottom, the greater, we may suppose, the temptation to assert it.

Hobsbawm, *Bandits*, 64–5. Obviously, the Bandit Avenger is not identical to the VOC's Just Avenger; the differences in class and status, explicitly cited by Hobsbawm and implicitly affirmed by Grotius, preclude sameness. Nevertheless, there is as ironical similitude between the two constructs: by invoking the presence of 'Justice' in the form of *ius naturale*, the Grotian Just Avenger necessarily signifies the presence of the Absolute that can culminate in unrestrained violence.

126 Grotius, *De Indis*, 91–92.

logical mandates of the minimal moral universe and the transference of legitimacy of public authority. The net result is a remarkable display of iterability between contending notions of collective/public and individual/private sovereignties, underpinned by an uneven oscillation between Thomistic and Humanist rhetoric.

The power of execution [is] conferred upon private individuals by a special law... For the wars that result when arms are taken up in such circumstances should perhaps be called public rather than private, since the state undertakes these wars, *in a sense*, and gives the command for them to be waged by said individuals. Yet it is true that, in the majority of cases, *the national origins of such conflicts is the same as that of private wars*. To take one example, certain laws grant the power of direct self-defence and vengeance¹²⁷ to private individuals, precisely on the ground that it is not easy to resist soldiers and collectors of public revenue through the medium of the courts; and these particular precepts accordingly represent what we retain of natural law—the vestiges of that law, so to speak—in regard to punishment. If the state is involved, what just end can be sought by the private avenger? The answer to this question is readily found in the teachings of Seneca, the philosopher *who maintains that there are two kinds of commonwealth, the world state and the municipal state*. In other words, the private avenger has in mind *the good of the whole human race*,¹²⁸ just as when he slays a serpent; and this goal corresponds exactly to that common good towards which, as we have said, all punishment's are directed in nature's plan.¹²⁹

The enigmatic figure of 'The Private Avenger' is arguably the most alien—and the most under-appreciated—juridical construct within the Grotian Heritage.¹³⁰ Van Ittersum has persuasively shown that the figure was modelled on no other than Admiral Heemskerck, the prize-taker of the *Santa Catarina*.¹³¹ She situates the historical genesis of *De Indis* in Grotius' efforts to 'disentangle' the conflicting rhetoric employed by the Dutch Admiralty Board in adjudicating the prize.¹³² Whereas Heemskerck justified his actions through private reliance upon *ius naturale*—as prescribed by Vitoria in the event of necessity—the Admiralty le-

127 *Se vindicandi potestas*; here, 'vengeance=punishment'

128 Notice the transposition to the quintessential Humanist construction of *Civitas*.

129 Ibid. 93. Emphases added

130 John Locke himself, with classic understatement, proclaimed it 'a very strange doctrine'. Locke, *Two Treatises of Government*, 272.

131 Martine Julia van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in De Jure Praedae (1604–1606)', *Asian Journal of the Social Sciences*, 31/3 (2003), 511–48, *passim*; Van Ittersum, 'Profit and Principle', 1–52.

132 'The judges were content to jumble together natural law, *ius gentium*, and the concept of the just war, without clarifying what, if any, connections there might be between these legal principles on a theoretical and practical level.' Van Ittersum, 'Hugo Grotius in Context', 523.

gitimised the seizure in terms of lawful revenge, or reprisal;¹³³ 'what had been revenge pure and simple in the resolution of [the privateers] became punishment for transgression of the natural law in *De Jure Praedae* [sic], meted out by private individuals exercising their natural rights'.¹³⁴ A purely empirical approach, however, belies the inherently radically proliferating nature of the Text. The problem of 'authorial presence' notwithstanding,¹³⁵ this discursive conflict may equally be interpreted as the manifestation of a deeper frisson between competing notions of primitive global governance, Positivist and Naturalist, both embedded within the Grotian Heritage. For World-Systems Analysis, lawful maritime predation enforced the *iurisdictio* of Corporate Sovereignty.

In terms of Deconstruction, Privateering at once signified both the inversion of the hierarchy between private and public authority as well as the sub-textual logic of the dangerous supplement governing the discursive transition to the suppressed pole of *Piracy*. Privateering renders iterable public/private dichotomies through a state adoption of private agency, the legitimacy of which may be effectively invalidated through non-recognition by a rival state. The Privateer is inherently 'dangerous' precisely because of the self-same iterability; the radical contingency of the legal identity of the Privateer constantly invokes the 'lurking presence' of the unlawful maritime predator, the Pirate. Whatever Grotius' authorial intent, whether to doctrinally clarify the verdict of the Admiralty or to justify the preservation of the VOC, *De Indis* provides a primitive model of an international *private* regime of global governance. 'The Private Avenger' violates that most foundational of constitutional precepts, the State as sole monopoliser of organised violence.¹³⁶ Grotian iterability and metaphysical inversion reach their zenith at precisely this juncture, reducing interstate relations to a collective aggregate of

133 'De Jure Praedae can be regarded as Grotius' attempt—a highly successful one—to disentangle the various strands of the law heaped together in the verdict of the Amsterdam Admiralty Board.' Ibid. 524. One may be sceptical concerning the overall 'success' of the attempt, however.

134 Ibid. 526. Accordingly, it was Late Scholasticism 'that allowed Grotius to untangle the various arguments jumbled together in the verdict of the Amsterdam Admiralty Board.' Ibid. 525.

135 After situating the composition of the apologetic *Historica* between 1604/5, Van Ittersum argues that 'at some point Grotius decided that 'certain problems bound up with the law of war' had been 'hitherto exceedingly confused' and demanded 'explanation and solution.' Ibid. 525. Yet we may wonder how Van Ittersum is able to attribute such a universalising impulse to Grotius if his subjective intent was the rather pedestrian one of 'disentangling' the doctrinal confusion evidenced by the Dutch Admiralty Board; her own reconstruction of authorial intent would appear to point to an effort to provide a more generally applicable mode of discursive formation for the wider purposes of primitive global governance. For additional discussion, see above, Introduction.

136 'Declared once, many times over, dead, Sovereignty remains the primary means by which the supreme power and legitimate violence of the State is territorially exercised in international relations.' James Der Derian, *Virtuous War: Mapping the Military-*

‘private’ transactions through the assignment of international legitimacy to any entity that is capable of exercising lawful violence as a ‘strong’ right legitimated by a ‘thin’ Humanist/apologetic ontology.

To appreciate the radically subversive nature of the Grotian ‘Just Avenger’, it is necessary to come to terms, in both an historically and philosophically honest way, the tremendously difficult legal problem of Privateering, both as a form of maritime predation and as a cultural artefact in its own right; that is, as a pivotal institutional innovation of the VOC;¹³⁷ any strategy of maritime predation, ‘however and whenever it was performed, was valid, provided it worked and was profitable. What we are talking about is not a choice between merchant and corsairs, but men [and women] who were sometimes one, sometimes the other, sometimes both simultaneously’¹³⁸ The element of ‘cognitive dissonance’ that one encounters here is owing to radical alterity introduced by the presence of *differance*; it is counter-intuitive to de-note the joint-stock company, the earliest institutional embodiment of capitalistic rationality, as the signifier of the most ruthless form of original accumulation imaginable.¹³⁹ Dissonance is eliminated, however, at the moment that the Company is re-located within the *histoire conjuncturelle* of the Modern World-System. The VOC’s ‘internalisation of protection costs’ was far more than a form of economic rationality; Privateering served a vital governance function, marking the sovereign identity of the Company as an international legal personality.

[Like] the trading empire of the Portuguese king, the [trade] companies were integrated, nonspecialized enterprises, but with one remarkable difference. They were run as a business, not an empire. By producing their own protection, the companies not only expropriated the tribute, but also became able to determine quality and costs of production themselves. This meant that protection costs were brought within the range of rational calculation instead of being in the unpredictable region of ‘the acts of God or of the King.’¹⁴⁰

VI The Privateer/Pirate as Juridical Nomad: Piracy and Anti-Systemic Movements

Divisible Sovereignty, when coupled with ‘the Private Avenger’, proved endlessly self-fracturing, yielding a ‘hyper-iterability’ that threatened to render incoher-

Industrial-Media-Entertainment Network (Boulder: Westview Press, 2001), xviii; Strong, *Whitewash*, 97–8.

137 See Thomson, *Mercenaries, Pirates, and Sovereigns*: on Pirates, 44–54 and 107–18; Privateers, 22–26 and 69–76; Mercenaries, 26–32, 54–59 and 77–96; and Filibusters, 118–40.

138 Goncal Lopez Nadal, ‘Corsairing as a Commercial System: the Edges of Legitimate Trade’, in Penell (ed.), *Bandits at Sea*, 125–38 at 133.

139 See above, Chapter Two.

140 Steensgaard, ‘Violence and the Rise of Capitalism’, 259–60.

ent any minimally acceptable concept of lawful Sovereignty, and, by extension, legitimate global governance; 'the pirate destroys all government and all order, by breaking all those ties and bonds that unite people in a civil society under any government.'¹⁴¹ The inherently *political* of maritime predation, signified by the alteration of State practice between Privateer and Pirate, is itself the institution-alised embodiment of the logic of the dangerous supplement. Whatever localised success Grotius may have had in 'containing' the subversive potential of the Privateer/Pirate on the micro-level of the United Provinces/VOC, the exact same dilemma was replicated on the macro-level of the Capitalist World-Economy.

Within the core zone, successful 'State building' was invariably equated with the successful monopolisation of violence coupled with a self-sustaining collection of 'protection rent', either in the form of 'tribute' or, in a more bureaucratised form, of 'taxation'.¹⁴² Accordingly

If protection rackets represent organized crime at its smoothest, then war making and state making—quintessential protection rackets with the advantage of legitimacy—qualify as our largest examples of organized crime. Without branding all generals and statesmen as murderers and thieves, I want to urge the value of that analogy. At least for the European experience of the last few centuries, a portrait of war makers and state makers as coercive and self-seeking entrepreneurs bears a far greater resemblance to the facts than do its chief alternatives: the idea of a social contract [i.e., Liberalism], the

141 Daniel Defoe, cited in Perotin-Dumon, 'The Pirate and the Emperor', 215.

142 'All state organization was originally military organization, organization for war.' Otto Hintze, 'Military Organization and the Organization of the State', in id. *The Historical Essays of Otto Hintze*. Edited by Felix Gilbert (Cambridge: Cambridge University Press, 1975), 180–215 at 181.

Virtually every dispute between a monarch and his subjects from the Magna Carta to the nineteenth century had been occasioned by the monarch's attempt to generate independently the subject's two critical resources, taxes and military manpower, the need for the latter virtually leading to the need for the former.

As a result, a

recurrent causal cycle in the development of the state' emerged: '(1) a change or expansion in armies; (2) new state efforts to extract resources from the subject populations; (3) the development of new state bureaucracies and administrative innovations; (4) resistance from the subject population; (5) renewed state coercion and/or enlargement of representative assemblies; (6) durable increases in the extractive bulk of the state.

Michael Mann, *A History of Power From the Beginning to A.D. 1760* (vol. i of *The Sources of Social Power*) (Cambridge: Cambridge University Press, 1986), 433. See *ibid.* 456, 476 and 479. See also Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge: Cambridge University Press, 1997), 1–34; Brian M. Downing, *The Military Revolution and Political Change: Origins of Democracy and Autocracy in Early Modern Europe* (Princeton: Princeton University Press, 1992), 9; Perry Anderson, *Lineages of the Absolutist State* (London: Verso, 1974), 33–5; Charles Tilly, 'War Making and State Making as Organized Crime', in Peter B. Evans (ed.), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), 169–191 at 172.

idea of an open market in which operators of armies and states offer services to willing consumers, the idea of a society whose shared aims and expectations call forth a certain kind of government.¹⁴³

Privateers/Pirates, operating as 'juridical nomads,' constituted an irreducibly *chaotic* element within the World-System. The subversive nomadism, or liminality, of Piracy was guaranteed through the inherently ambivalent juridical status of the practice: 'a legalistic approach runs into the fact that there is not, and never has been an authoritative definition of piracy in international law.'¹⁴⁴ The difference(s) between liminal and 'status positions' are governed, appropriately enough, by a series of binary oppositions. For Piracy, the most relevant of these are the ones identified by Turner: absence of status/status; absence of rank/distinctions of rank; and suspension of kinship rights and obligations/kinship rights and obligations.¹⁴⁵ The final set is the one most relevant to the Pirate's archetypal 'anti-social' status as 'enemy of all mankind'; the notion of the Pirate as one who takes up arms against both his natural and political family (the State) is a dominant motif within piratical literature and jurisprudence. Piracy must be proscribed so as to maintain the 'correct' hierarchical relationship between unlawful and unlawful forms of maritime violence, such as Privateering, juridically signified by the letter of marque. However, the precise absence of any requisite form of juridical demarcation, coupled with the inherent similitude between the dyadic forms of depredation, rendered a self-grounding taxonomy impossible, in both substantive¹⁴⁶ and

143 Ibid.169.

144 Perotin-Dumon, 'The Pirate and the Emperor', 198. For a comprehensive review of contemporary jurisprudence, see Sundberg, 'Piracy: Air and Sea', *passim*, who takes a refreshingly Nominalist approach to the entire issue:

Many contemporary problems arise from the belief that words generally, and legal terms particularly, must have an inner meaning, just like children must have parents. Legal terms have no meaning except in relation to their practical context. The understanding of a legal term means only that one realizes how to use it in communication with others.

Ibid. 337.

145 Turner, *The Ritual Process*, 106.

146 On closer examination, Piracy appears to be a composite or 'fragmentary' concept. The word "piracy" is being used in certain treaties only because of its historical connotations, even though the context of the treaties demonstrates that the types of 'piracy' included therein are usually nothing more than separate domestic crimes of terrorism (which knows no boundary demarcation) joined together under the word piracy... The definition of acts of piracy which may be considered a crime or offence under the [1958 Convention on the High Seas] is nothing more than one or more separate crimes grouped together under one heading. If this is so, then there really is no uniform offence or crime of piracy. Rather, the word piracy could constitute one or many different

jurisdictional¹⁴⁷ terms; the 'lack of a legal definition of international piracy shows the relativity that has always characterised the identity of the pirate [in] the terms employed... pirate, privateer, corsair, freebooter... When all was said and done, the pirate was the "other"; he was a problem because he was culturally different.'¹⁴⁸ Within these terms, the 'deep-sea proletariat'¹⁴⁹ could plausibly be seen as constitutive of an early modern 'anti-systemic movement.'¹⁵⁰ Admittedly, Wallerstein

crimes and acts of terrorism according to the dictates of the State which is affected by the incident(s).

Barry Hart Dubner, *The Law of International Sea-Piracy* (The Hague: Martinus Nijhoff Publishers, 1980), 39. See Rubin, *The Law of Piracy*, 42: 'The word 'piracy' entered modern English usage in a vernacular sense to cover almost any interference with property rights, whether licensed or not, and was applied as a pejorative with political implications, but no clear legal meaning.' The minimally adequate 'classical' definition of Piracy appears to be 'acts of depredation committed by a private ship against another ship on the high seas for private, commercial gain.' John E. Noyes, 'An Introduction to the International Law of Piracy', *California Western International Law Journal*, 21 (1991), 105–21 at 105.

147 Rubin, *The Law of Piracy*, 393:

In both current practice and in current theory built upon ancient roots and the evolution of the international political and legal orders, there is no public international law defining 'piracy'; that the only comprehensible legal definitions of 'piracy' exist in municipal law and are applicable only in municipal tribunals bound to apply that law; that these examples of municipal law do not represent any universal 'law of nations' based on moral principle and right reason exemplified through identical laws of different countries, but rather rest on the on national policies made law by the constitutional processes of the different legal orders involved; that such other uses of the word 'piracy' as exist in international communication reflect vernacular usages, pejoratives, and perhaps memories of imperial Rome and imperial Britain inconsistent with the current legal order and of doubtful legal effect even when used most emphatically in the heyday of both empires.

148 Perotin-Dumon, 'The Pirate and the Emperor', 202 and 210. As we should expect, irregularities of legal taxonomy parallel vicissitudes of State praxis.

Technically, pirates were clearly distinguishable from privateers. Privateers possessed a state's authority to commit violence. They targeted only the enemies of the authorizing state. They operated only during wartime. Yet, in practice, who was to say whether the Elizabethan Sea Dogs, the Barbary corsairs, or the Malabar Angrias were pirates or privateers? Moreover... at the end of every war, large numbers of privateers turned pirates only to be granted new privateering commissions on the outbreak of the next war. So long as states insisted to exploit individual violence, piracy could not even be defined, much less suppressed.

Thomson, *Mercenaries, Pirates, and Sovereigns*, 140.

149 Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (London: Penguin Books, 1991), 123.

150 Immanuel Wallerstein, *Unthinking Social Science: The Limits of the Nineteenth-Century Paradigm*, 2nd edn (Philadelphia: Temple University Press, 2001), 25–31; Wallerstein, *The End of the World as We Know It*, 40, 70–1, 131–2, 150–3 and 204; Immanuel Wallerstein, *Geopolitics and Geoculture: Essays on the Changing World*

restricts the historical emergence of 'true' anti-systemic movements to the 19th century,¹⁵¹ commensurate with the global geo-spatial extension of the Modern World-System. The 'central fact of the historical sociology of the late nineteenth and early twentieth century Europe has been the emergence of powerful social movements which implicitly or explicitly challenged the achievements of triumphant capitalism,¹⁵² structured upon the parallel developments of Organised Labour and National Liberation.¹⁵³ These anti-systemic movements, in turn, are temporally embedded within the secular World-System;¹⁵⁴ consequently, within

System (Cambridge: Cambridge University Press, 1991), 104–22; Giovanni Arrighi, Terence K. Hopkins, and Immanuel Wallerstein, *Antisystemic Movements* (London: Verso, 1987), 1–51.

Rather than chance associations of individual criminals, eighteenth-century European pirates can now be seen as a socially deviant subculture engaged in an inchoate maritime revolt: 'a blind popular uprising, a *jacquerie* directed against sea captains and merchants, almost a slave revolt.' This spasmodic uprising was characterized more by the centrifugal binding ethos of a primitive, yet definable, proto-ideology than by centripetal motives of individual greed. It is this *gestalt* which nourished the revolt as it waged war on the entire world with astounding vigour.

Kinkor, 'Black Men under the Black Flag', 196.

- 151 The anti-systemic movements 'have had their own mode of self-description. This self-description emerged largely out of categories that were formulated or crystallized in the nineteenth-century capitalist world-economy. Class and status-groups were the two key concepts that justified these movements, explained their origins and objectives, and indeed indicated the boundaries of their organization networks.' Arrighi, Hopkins and Wallerstein, *Antisystemic Movements*, 1.

- 152 *Ibid.* 77.

- 153 *Ibid.* 30–1:

In the course of the nineteenth century, two principal varieties of anti-systemic movements emerged—what came to be called respectively the 'social movement' and the 'national movement'. The major difference between them lay in their definition of the problem [of the global hierarchy of the Modern World-System]. The social movement defined the oppression as that of employers over wage earners, the bourgeoisie over the proletariat. The ideals of the French Revolution—liberty, equality, and fraternity—could be realized, they felt, by replacing capitalism with socialism. The national movement, on the other hand, defined the oppression as that of one ethno-national group over another. The ideals could be realized by giving the oppressed group equal juridical status with the oppressing group by the creation of parallel (and usually separate) structures.

For Organized Labour, see Wallerstein, *Unthinking Social Science*, 117, 166 and 168; for National Liberation, see Wallerstein, *The End of the World as We Know It*, 2–30. In the most general historical terms, anti-colonialism provided the nexus between the two movements.

- 154 Terence K. Hopkins and Immanuel Wallerstein, 'Patterns of Development of the Modern World-System', in Terence K. Hopkins, (ed.), *World-Systems Analysis: Theory and Knowledge* (Beverly Hills: Sage, 1982), 41–82 at 42.

[The] arena in which [anti-systemic]social action takes place and social change occurs is... a definite 'world'; a spatio-temporal whole, whose spatial scope is co-extensive with

the temporal wave of *la longue duree* all anti-systemic movements betray a fundamental continuity of resistance to all forms of hierarchy.

Opposition to oppression is coterminous with the existence of hierarchical social systems. Opposition is permanent but for the most part latent... In the early history of the capitalist world-economy, the situation remained more or less the same as it had always been in this regard. Rebellions were many, scattered, discrete, momentary, and only partially efficacious at best. One of the contradictions, however, of capitalism as a system is that the very integrating tendencies that have been one of its defining characteristics have had an impact on the form of anti-systemic activities.¹⁵⁵

Therefore, an argument can be made that just as early International Law constituted a form of 'primitive' global governance, Piracy functioned as a 'primitive' anti-systemic movement,¹⁵⁶ co-determinate in extent and operation with the early Capitalist World-Economy.¹⁵⁷ The severe economic dislocations of the European

the elementary division of labour among its constituent regions or parts and whose temporal scope extends for as long as the elementary division of labour continually reproduces the 'world' as a social whole.

155 Arrighi, Hopkins and Wallerstein, *Antisystemic Movements*, 29–30.

156 To a degree, this assertion is axiomatic. If the early modern Capitalist World-Economy of the Spanish Epoch can be shown to have possessed a residual organisational structure, then some degree of resistance, commensurate in organisational form, would have arisen against it; 'opposition to oppression is co-determinous with the existence of hierarchical social systems' Ibid. 29.

157 Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, ii, 865–91; Wallerstein, *The Modern World-System I*, 55–6, 141–3, 196, 198, 200, 211, 218, 266, 276, 280, 334 and 355; Wallerstein, *The Modern World-System II*, 48, 51, 69, 91, 111, 128, 157–61, 163, 182, 188, 198, 238, 249, 260 and 271–2; David J. Starkey, 'Pirates and Markets', *Research in Maritime History*, 17 (1994), 59–80, *passim*; Marcus B. Rediker, *Villains of All Nations: Atlantic Pirates in the Golden Age* (London: Verso, 2004), 19–37. For an extended discussion of the manner in which statism and Piracy/Brigandage formed a symbiotic or co-constitutive relationship, see Thomas W. Gallant, 'Brigandage, Piracy, Capitalism, and State-Formation: Transnational Crime from a Historical World-Systems Perspective', in Josiah Heyman (ed.), *States and Illegal Practices* (Oxford: Berg, 1999), 25–61, *passim*. Rather 'than being archaic remnants of the pre-modern world, bandits and pirates were directly related to the development of a capitalist world-system and the formation of modern states.' Ibid. 50. Within peripheral and semi-peripheral zones, brigands facilitated the capitalistic penetration of the hinterlands through the injection of contraband commodities and capital and connected local settlements to wider markets. The need to eradicate these shadow networks and to centralise statist control leads the State into the hinterland, facilitating 'modern' state-formation. Conversely, Brigands and Pirates—in Gallant's terminology, 'military entrepreneurs'—inverted the political relationship by undertaking revolution and/or aligning themselves with successful political factions. Ibid. 37, 38, 40, 42, and 50–2.

world system yielded a vast reservoir of vagrant workers ('masterless men'¹⁵⁸), prompting a corresponding obsession with capital crime among the propertied classes,¹⁵⁹ the primary beneficiaries of the nascent global economy.¹⁶⁰ Because the structural foundation of the World-Economy was network/commercial rather than institutional/statist, the morphology of the primitive anti-systemic movements exhibited a similar diffuseness. 'What deprived this army of vagrant sub-proletarians of its force, in spite of the fear it inspired was its lack of cohesion... this was not a class but a rabble';¹⁶¹ a 'rabble' highly prone to brigandage and organised crime.¹⁶² To some degree, Piracy successfully imposed a 'primitive' mode

158 Fernand Braudel, *The Wheels of Commerce* (New York: Harper & Row Publishers, 1982), 506–12.

159 See Douglas Hay, 'Property, Authority and the Criminal Law', in Douglas Hay, et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Harmondsworth: Penguin Books, 1975), 17–63, *passim*. 'The rulers of eighteenth century England cherished the death penalty.' Ibid. 17.

160 By the beginning of the 18th century

individuals had particularly good reasons for resisting the nascent European national state. The judicial system was rapidly turning into a mechanism for defending property and for producing and disciplining labour. Capital punishment was expanded with a vengeance... By 1800, 'at least in theory, English property law was protected by the most comprehensive system of capital punishment statutes ever devised'... But instead of executing people in droves, states found it more productive to impose forced labour on the [miscreants]. He need for labour at home, in the military, and in the colonies meant that 'incarceration in workhouses, gallery slavery and transportation to bleak, colonial areas served as a much more rational end than did execution'... It is not surprising, then, that resistance to European states and society was fierce nor that it took the form of an attack on property [*lucris causa; animo furandi*]. Piracy was not simply or always an economic crime—the theft of private property. It was also a political act—a protest against the obvious use of state institutions to defend property and discipline labour.

Thomson, *Mercenaries, Pirates, and Sovereigns*, 46.

161 Braudel, *The Wheels of Commerce*, 512. Braudel rightly highlights the sporadic nature of vagrant insurgency; 'its spontaneous bursts of violence were isolated.' Ibid. This fits in well with World-Systems Analysis, which directly correlates the sophistication of the world-system with the sophistication of the political opposition generated by it.

One constraining sociological characteristic of... rebellions of the oppressed has been their 'spontaneous', short-term character. They have come and they have gone, having such effect as they did... When the next such rebellion came, it normally had little explicit relationship with the previous one. Indeed, this has been one of the great strengths of the world's ruling states through history—the non-continuity of rebellions.

Arrighi, Hopkins and Wallerstein, *Antisystemic Movements*, 29.

162 Braudel *The Mediterranean and the Mediterranean World in the Age of Philip II*, ii, 734–56. Again, it is most useful to regard peasant brigandage as a primitive form of anti-systemic movement, embedded within the internal political logic of the European sub-system. It would be

a serious error to see banditry as a form of traditional feudal opposition to state authority. It was the consequence of the inadequate growth of state authority, the inability of

of political self-consciousness on the sporadically insurgent sub-classes: 'Pirates constructed a culture of masterless men.'¹⁶³ There was an element of objective geo-spatial organisation.

Was it possible to escape from this hell? Occasionally yes, but never unaided, never without accepting some kind of close reliance on other men. One had either to swim to the shore of social organization, of whatever kind, or build an alternative society from scratch, a counter-society with its own laws. The organized band of criminals—false salt-merchants, forgers, smugglers, brigands, and pirates, or those special communities, the army and the huge world of domestic service—were almost the only refuge for those trying to escape from the ranks of the damned. Smuggling and fraud, in order to exist, had to build a disciplined organization, with long chains of solidarity.¹⁶⁴ Banditry had

the state to compensate for the dislocations caused by the economic and social turbulence, the unwillingness of the state to ensure some greater equalization of distribution in times of inflation, population growth and food shortages. Banditry was in this sense created by the state itself, both by depriving some nobles of traditional rights (and hence sources of wealth) and some peasants of their produce to feed the new bureaucracies, and by creating in the state itself a larger concentration of wealth such that it became more tempting to try to seize part of it. Banditry was a symptom of the dislocations caused by the tremendous economic reallocations resulting from the creation of a European world-economy.

Wallerstein, *The Modern World System I*, 143.

- 163 Marcus B. Rediker, *Between the Devil and the Blue Sea: Merchant Seamen, Pirates and the Anglo-American Maritime World, 1700–1750* (Cambridge: Cambridge University Press, 1987), 286. In this regard, Piracy most closely resembles Hobsbawm's notion of Social Banditry.

A universal and virtually unchanging phenomenon, [it] is little more than endemic peasant protest against oppression and poverty: a cry for vengeance on the rich and the oppressors, a vague dream of some curb upon them, a righting of individual wrongs. Its ambitions are modest: a traditional world in which men are justly dealt with, not a new and perfect world.

Eric Hobsbawm, *Primitive Rebels: Studies in Archaic Forms of Social Movement in the 19th and 20th Centuries*, 3rd edn (Manchester: Manchester University Press, 1971), 5. A variant of 'primitive rebels', Social Bandits/Pirates are 'revolutionary traditionalists'. Ibid. 27 and 28; see Hobsbawm, *Bandits*, 24–9.

- 164 'Sea-pirates were aided and abetted by powerful towns and cities. Pirates on land, bandits, received regular backing from nobles. Robber bands were often led, or more or less closely directed, by some genuine nobleman.' Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, ii, 749. Thus, seventeenth-century organised crime is remarkably similar to that of the 21st, in that state-supplied protection is indispensable for success; see Mark H. Haller, 'Illegal Enterprises: A Theoretical and Historical Interpretation', in Nikos Passas (ed.), *Organized Crime* (Aldershot: Dartmouth, 1995), 225–54, *passim*. 'Trans-national crime may well transcend conventional activities and mingle with entrepreneurial and, at times, governmental deviance... in this respect, it is appropriate to identify trans-national organized crime as the result of a partnership between illegitimate and legitimate actors.' Ruggerio, 'Global Markets and Crime', 177.

its chiefs, its gangs and its leaders—often noblemen.¹⁶⁵ As for privateering and piracy, they actually depended upon the support of at least one city. Algiers, Tripoli, Pisa, Valletta and Segna were the bases of the Barbary Corsairs, the Knights of San Stefano, the Knights of Malta and the Uskoks, enemies of Venice.¹⁶⁶

More important was the correspondence between Piracy and Organised Labour.¹⁶⁷ The sign of a radically egalitarian form of Republicanism,¹⁶⁸ Piracy formed an anti-authoritarian 'Hydrachy', the inversion of the Absolutist 'maritime state'.¹⁶⁹

- 165 Ironically, organised tax resistance frequently constituted a *rival* rather than an *anti-systemic* movement.

The new taxes imposed by the Absolutist states [constituted a] 'centralized feudal rent' as opposed to the seigneurial dues which formed a 'local feudal rent': this doubled system of exactions led to a tormented epidemic of rebellions by the poor in 17th century France, in which provincial nobles often led their own peasants against the tax-collectors, so as the better to be able to extort their local dues from them.

Anderson, 'Piracy and World History', 35.

- 166 Braudel, *The Wheels of Commerce*, 512–13.

- 167 The international maritime proletariat constituted the world's 'first collective labourer'. Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon Press, 2000), 130.

Seamen were one of the largest and most important groups of free wage labourers in the international market of the eighteenth century... the seamen occupied a pivotal position in the creation of international markets and a waged working class, as well as in the worldwide concentration and organization of capital and labour.

Rediker, *Between the Devil and the Blue Sea*, 77; see also *ibid.* 205–53. Also see Linebaugh, *The London Hanged*, 123–42.

- 168 Christopher Hill, 'Radical Pirates?', in *People and Ideas in 17th Century England* (Hampshire: Harvester Press, 1986), 161–87, *passim*; J.S. Bromley, 'Outlaws at Sea, 1660–1720: Liberty, Equality and Fraternity among the Caribbean Freebooters', in C.R. Pennell (ed.), *Bandits at Sea: A Pirate Reader* (New York: New York University Press, 2001), 169–94, *passim*; Rediker, *Between the Devil and the Blue Sea*, 254–87.

- 169 Linebaugh and Rediker, *The Many-Headed Hydra*, 143–73. 'Hydrarchy' denotes two related developments of the late seventeenth century: the organization of the maritime state from above, and the self-organization of sailors from below. As... sailors made the Atlantic a zone for the accumulation of capital, they began to join with others in faithfulness and solidarity, producing a maritime radical tradition that also made it a zone of freedom. The ship thus became both an engine of capitalism in the wake of the bourgeois revolution in England *and* a setting of resistance, a place to which and in which the ideas and practices of revolutionaries defeated and repressed by Cromwell and then by King Charles escaped, re-formed, circulated and persisted.

Ibid. 144–5. The State's ability to effectively repress Piracy and to re-establish disciplinary control over the maritime proletariat was, in itself, a key signifier of that State's successful transition to Absolutism; in this sense, the 'de-democratization' of maritime violence served as an indispensable characteristic of juridical Modernity. See Thomson, *Mercenaries, Pirates, and Sovereigns*, 43–54.

There is a remarkable similitude between the micro- and macro-levels of piratical enterprise. On the micro-level, the Pirate/Privateer as 'pariah entrepreneur' constituted the mimetic parody of the Gentlemen XVII, the signifier of 'a kind of proto-individualist-anarchist attitude'.¹⁷⁰ On the macro-level, Piracy signified the subversive (and subverting) transformation of the deep-sea proletariat into 'a floating mob with its own distinctive sense of popular justice,' that would freely traverse the liminal boundaries of maritime Crime/Law.¹⁷¹ The 'underground' history of maritime predation, when synthesised with the Grotian doctrine of Divisible Sovereignty, yields a fascinating juro-political hybrid; Hydrachy as the visceral expression of the potential of Grotian divisibility for metaphysical inversion, here manifested as Trans-National Organised Crime (TOC) constituting a 'primitive' form of Trans-National Criminal Organisation (TCO).

In this regard Thomson is mistaken in her explanation for the effective suppression of Piracy in the Atlantic Ocean following the 'Golden Age' of c. 1690–1730. For her account to be persuasive the issue of the effective de-legitimation of the parallel phenomenon of Privateering is critical.

Tracing the globalisation of the norm against piracy on the high seas is not easy. My argument is that no clear norm could develop, much less be universalised, until the state itself produced a clear definition of what constituted piracy. *And this was impossible so long as states continued to regard individual violence as an exploitable resource.* Simply put, piracy could not be expunged until it was defined, and it could not be defined until it was distinguished from state-sponsored or sanctioned individual violence. International norms were universalised only with the de-legitimation of the practice of privateering.¹⁷²

Chronology poses an insuperable difficulty to Thomson's argument. The 'Atlantic zone' that witnessed the effective demise of Piracy in the first quarter of the 18th century was the self-same oceanic system that endured the 'golden age of Privateering' during the American War of Independence (1775–1783) and the World-System 'French Wars' of the Napoleonic era (1793–1815). The de-legitimation of Privateering may have served as a necessary but hardly as a sufficient condition for the abolition of Piracy, as the century long 'time-lag' clearly demonstrates.

In the alternative, the truly sufficient explanation for the systemic destruction of Piracy within the core zone of the World-System was the expressly political realisation by the Maritime States that Piracy constituted—or, in the alternative,

170 Wilson, *Pirate Utopias*, 52.

171 The political transgressions of the maritime proletariat were most frequently expressed, in ascending order of seditiousness, as desertion, mutiny, riot, and Piracy. Rediker, *Villains of All Nations*, 288–98. 'The mass resistance of [Anglo-American] sailors began in the 1620s, when they mutinied and rioted over pay and conditions; it reached a new stage when they led the urban mobs of London that inaugurated the revolutionary crisis of 1640–1.' Ibid. 156.

172 Thomson, *Mercenaries, Pirates, and Sovereigns*, 117–18.

had effectively evolved into—an insurrectionary anti-systemic movement. Intriguingly, the final wave of Piracy within the core Atlantic zone—the explosion of maritime predation throughout the Caribbean from 1815–1835—appears to be fully explicable only within the context of the Bolivarist wars of national liberation against Iberia then engulfing Central and South America.¹⁷³

VII Government Contra Governance: *De Indis*, Heterogeneity, and Divisible Sovereignty

Divisible Sovereignty pluralises the allocation of authority,¹⁷⁴ effectively reducing it to an anti-essentialist act of mutual recognition of certain culturally-defined ‘marks’,¹⁷⁵ expressly correlated with the effective ‘production of protection’.¹⁷⁶ The prospective *differance* opened up by *De Indis* ironically provides the basis for a more sophisticated understanding of otherwise unintelligible features of contemporary International Law and International Relations, both governed by the heteronomous logic of the Modern World-System. The ‘public’ Text of the *Commentarius* clearly recognises the iterable nature of authority, identified with Sovereignty; ‘Since he who holds a mark of Sovereignty has no overlord in respect of that mark, it follows that the right to pass judgement must necessarily be an adjunct of that mark of sovereignty.’¹⁷⁷ Concomitantly, the ‘private’ Text of *De Indis* invests the Corporate Sovereign with the public function of commutative justice, virtually identical with ‘protection’; ‘The slaughter of human beings is the greatest

173 Starkey, ‘Pirates and Markets’, 65–6 and 76–7.

174 Defined by Raz as ‘a right to make laws and regulations, to judge and punish for failing to conform to certain standards, or to order some redress for the victims of such violations, as well as the right to command.’ Joseph Raz, ‘Introduction’, in id. (ed.), *Authority* (New York: New York University Press, 1990), 1–19 at 2. By now it should be clear that authority may legitimately be exercised by a Pirate, a Gangster, a Private Avenger, a State official, or a Revolutionary, depending upon the socio-historical context of the affirmative act.

175 R.B. Friedman, ‘On the Concept of Authority in Political Philosophy’, in Joseph Raz (ed.), *Authority* (New York: New York University Press, 1990), 68–71, *passim*; Steve Lukes, ‘Perspectives in Authority’, in Joseph Raz (ed.), *Authority* (New York: New York University Press, 1990), 203–17, *passim*.

176 Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996), 110:

Cosa Nostra... provided the model of counter-government. It engages in activities declared illegal by the state, but at the same time initiates, in mirror fashion, many of the characteristics of formal state government... Both states and mafias own and operate enterprises, although for both the survival of the organization takes precedence over profit maximization. Like a state, too, a mafia is an economic parasite, in the sense that it raises revenue from civil society by demanding payment for protection. Governments call this taxation to pay for public goods when they do it, extortion when the mafia does it.

177 Grotius, *Commentarius in Theses XI*, 277.

of criminal offences, a fact that accounts for the laws against assassins. Now, the Portuguese slaughtered many Hollanders in the vilest and most brutal fashion,¹⁷⁸ and therefore, the East India Company could not conscientiously have neglected to avenge its servants.¹⁷⁹ The contemporary legitimization of sub-statist authority via performative recognition¹⁸⁰ creates the possibility of an heteronomous 'post-international politics,'¹⁸¹ centred upon a porous 'two-world political universe,' one state-centric and one multi-centric.¹⁸²

Although Organised Labour and National Liberation constituted the 'true' anti-systemic movements, they ultimately failed to achieve a structural transformation of the Modern World-System.¹⁸³ Ironically, it is the 'primitive' anti-systemic movements of Piracy and TCOs that may prove ultimately more efficacious, as they directly signify the 'Presence' of a multi-centric order;¹⁸⁴ it is therefore possible to interpret the corruption of governmental structure as the heteronomous 'privatisation' of public authority.¹⁸⁵ This point is supremely well

178 Grotius, *De Indis*, C. XI, 168–215.

179 Ibid. 269.

180 James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990), 186–91.

181 Ibid. 6.

182 Ibid. 11.

183 Wallerstein, *Unthinking Social Science*, 7–22.

184 Rosenau expressly identifies post-international politics with the proliferation of 'sub-groupism'. Rosenau, *Turbulence in World Politics*, 403–12.

185 Nikos Passas, 'A Structural Analysis of Corruption: The Role of Criminogenic Asymmetries', *Transnational Organized Crime*, 4 (1998), 42–55 at 44–5.

Most of the time, corruption entails a confusion of the private with the public sphere or an illicit exchange between the two spheres. At both the policy-making and law-enforcement levels, corrupt practices involve *public officials acting in the best interests of private concerns*, regardless of, or against the public interest. Therefore, corruption can be defined as the *covert privatisation of government functions*.

Over time, 'illicit privatisation' may result in the complete fusion of criminal and statist forms.

The ability to corrupt is... dependent on how integrated the individual or group is into the "legitimate" society. If they have secure positions of influence and power and therefore have entwined themselves into the power structure through either the economic sphere, political alignments, or the enforcement/criminal justice field, their activities are more easily defined as legitimate. With this integration comes invisibility in that decisions taken, policies passed and agreements signed are not defined as corruption but rather as "normal" operations of business or enterprise.

Margaret E. Beare, 'Corruption and Organized Crime: Lessons from History', *Crime, Law & Social Change*, 28 (1997), 155–72 at 158. See Phil Williams, 'Transnational Organized Crime and the State', in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 161–82, *passim*; Peter Lupsha, 'Transnational Organized Crime versus the Nation-State', in Nikos Passas (ed.), *Transnational*

expressed by Tilly in his Introduction to Blok's seminal cultural anthropological work, *The Mafia of a Sicilian Village, 1860–1960*.

The processes Anton Blok has witnessed in Sicily are, in fact, standard state-building processes: consolidation of control over the use of force, elimination of rivals, formation of coalitions, extension of protection, routinised extraction of resources. If one *mafia* network managed to extend its control over all of Sicily, all concerned would begin to describe its actions as 'public' rather than 'private', the national government would have to come to terms with it,¹⁸⁶ outsiders and insiders alike would begin to treat its chiefs with legitimate authority. It would be a government; it would resemble a State. With outside recognition of its authority [i.e., a treaty-making capacity], plus the development of differentiated and centralized instruments of control, it would *be* a State... The difficulty [identified by Blok] is simply that Sicily now has many such proto-states... Sicily's problem is not a shortage, but a surfeit of such government[s].¹⁸⁷

Once the de-constructive implications of the Grotian Heritage are clearly understood, one is led to the realisation that Grotius, despite his own patrician biases, lends authorial legitimacy to an inherently heteronomous international order that potentially de-stabilises global governance. The discursive constructions of Corporate Sovereignty and the Private Avenger legitimise both the radical privatisation of public authority and the politicisation of Piracy. This becomes even clearer when we recognise that the TCO is the historical nexus that links Piracy¹⁸⁸ with anti-systemic movements:¹⁸⁹ narco-trafficking,¹⁹⁰ weapons trafficking,¹⁹¹ and

Crime (Aldershot: Dartmouth, 1999), 3–30, *passim*; Robert J. Bunker, and John P. Sullivan, 'Cartel Evolution: Potentials and Consequences', *Transnational Organized Crime*, 4/2 (1998) 55–74, *passim*.

186 It already has, through the Mafia's 'privatised replication' of the 'enforcement' functions of the State. See, Catanzaro, 'Violent Social Regulation', *passim*; Passas, 'A Structural Analysis of Corruption', *passim*.

187 Charles Tilly, 'Foreword', in Anton Blok, *The Mafia of a Sicilian Village 1860–1960: A Study of Violent Entrepreneurs* (Cambridge: Polity Press, 1974), xiii–xxiv at xxiii.

188 Jaynat Abhyankar, 'Maritime Fraud and Piracy', *Transnational Organized Crime*, 4 (1998), 157–94, *passim*.

189 Alex P. Schmid, 'The Links between Transnational Organized Crime and Terrorist Crimes', *Transnational Organized Crime*, 2 (1996), 40–82, *passim*.

190 R.T. Naylor, 'The Insurgent Economy: Black Market Operations of Guerrilla Organizations', *Crime, Law and Social Change*, 20 (1993), 13–51 at 35–9 and 41; Williams, 'Transnational Organized Crime and the State', 41. 'Those involved in political conflict or war... are increasingly impelled to use drugs as a source of money with which to buy arms.' Pino Arlacchi, *Mafia Business: The Mafia Ethic and the Spirit of Capitalism* (London: Verso, 1983), 218.

191 R.T. Naylor, 'Loose Cannons: Covert Commerce and Underground Finance in the Modern Arms Black Market', in Nikos Passas (ed.), *Transnational Crime* (Aldershot: Dartmouth, 1999), 207–64, *passim*.

money-laundering¹⁹² all serve as vital sources of revenue for National Liberation fronts. This constitutes a vital nexus between anti-systemic movements and the colonial difference.

More problematic is an emergent linkage between Piracy and Terrorism. Consistent with the modern bias for the 'public' monopolisation of violence, contemporary international legal scholarship has a-historically 'de-politicised' Piracy, the current minimally acceptable definition is 'any armed violence at sea which is not a lawful act of war,'¹⁹³ premised upon a strict demarcation between 'private acts' and 'political purposes'.¹⁹⁴ Accordingly, the Harvard Group Draft Convention on Piracy declares that the 'draft convention excludes from its definition of Piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognised revolutionary bands.'¹⁹⁵ Even though there is no universally accept-

192 Strange, *The Retreat of the State*, 110–21; Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (London: Zed Books, 2001), 146, 158, 162, 180–1, 187, 190 and 199.

193 *Re. Piracy Jure Gentium* [1934] AC 586, reprinted in *Jurisdiction* (vol. iii of *British International Law Cases*) (London: Stevens & Sons, 1965), 836–43 at 842.

194 Edwin D. Dickinson, 'Is the Crime of Piracy Obsolete?', *Harvard Law Review*, 38 (1925), 334–60, *passim*; D.H.N. Johnson, 'Piracy in Modern International Law', *Grotius Society Transactions*, 43 (1957), 63–85, *passim*; L.C. Green, 'The *Santa Maria*: Rebels or Pirates?', *British Yearbook of International Law*, 37 (1961), 496–505, *passim*.

195 'Harvard Group Draft Convention on Piracy', *American Journal of International Law* (1932), Supplement, 739–885 at 786. The 'de-politicising' of Piracy appears to be linked to the Harvard Group's deference to the positivist doctrine of Recognition: 'whether a nation chooses to treat a vessel as insurgent or belligerent is usually a political choice, not a legal one.' Barry Hart Dubner, *The Law of International Sea-Piracy* (The Hague: Martinus Nijhoff Publishers, 1980), 51. Constantinople makes clear the relationship between the 'private act' of Piracy and anti-systemic movements:

the [Harvard] drafters gave no attention to acts of violence committed on the high seas for public ends and thus they ignored the growing threat that organized insurgents, national liberation organizations and their splinter groups, informal groups and isolated individuals would attack and seize ships on the high seas. In modern times, terrorist groups carry out seemingly random acts of violence against innocent civilians to instil fear in the larger community. When such acts occur on the high seas, beyond the jurisdiction of any state and far from the reach of police or military forces, there is a compelling need to invoke the effective basis of piracy, its 'special jurisdiction'. In this way, the forces of all States can police the high seas to minimize terrorism.

George R. Constantinople, 'The *Achille Lauro* Incident', *Virginia Journal of International Law*, 26 (1985–86), 723–53 at 752. See also Malvina Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety', *American Journal of International Law*, 82 (1988), 269–310, *passim*; L.F.E. Goldie, 'Terrorism, Piracy and the Nyon Agreements', in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff Publishers, 1989), 225–48, *passim*; L.C. Green, 'Terrorism and the Law of the Sea', in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht:

able definition of Terrorism,¹⁹⁶ the metaphysical inversion between 'Private' and 'Public'—a taxonomic re-classification fully consistent with Grotian discourse—is sufficient to 're-politicise' Piracy as a trans-national public act, commensurate with the (quasi-) public Private Avenger;¹⁹⁷ 'there is no question that acts of terrorism under modern conditions would constitute piracy under traditional and conventional law if the limitation [of 'private acts'] were not present.'¹⁹⁸ Concomitantly, the conflation of Terrorism with Piracy, which would politicise the maritime crime, would signify a discursive shift away from subjective Recognition and

Martinus Nijhoff Publishers, 1989), 249–91, *passim*. It is an under-appreciated consideration that States were enthusiastic to 'privatise' Piracy primarily as a means of thwarting any attempt to have attributed against them State responsibility for their own adoption, either active or passive, of 'piratical enterprises.' Thomson, *Mercenaries, Pirates and Sovereigns*, 43–4. Zarate, 'The Emergence of a New Dog of War', at 91 and 115 makes the same point for mercenaries and filibusters:

those states from which the mercenaries are supplied have a vested interest in retaining the option to influence the foreign conflicts by allowing mercenaries to sell their services with the possibility of denying responsibility for their actions... [Conversely] unlike rogue mercenaries, [security companies] provide military training and services in a quasi-official capacity, although their home states are likely to disavow their 'private' activities.

- 196 Constantinople, 'The *Achille Lauro* Incident', 723–4 fn. 1. Accordingly, as with Piracy, the absence of a self-grounded definition of Terrorism transforms the 'terrorist' into a liminal *personae*. For the repetitive discursive mimesis linking terrorist with pirate, see Ilena Porras, 'On Terrorism: Reflections on Violence and the Outlaw', in Dan Danielse and Karen Engle (eds), *After Identity: A Reader in Law and Culture* (New York: Routledge, Kegan & Paul, 1995), 294–313, *passim*.

We think of [terrorists] as boundary violators. They cross international boundaries. They are uncontrollable. They violate the accepted boundary between normal and extra-normal violence. They violate the boundary between appropriate and inappropriate victims. They cross the boundary between acceptable challenge to the ['world?'] system and the unacceptable desire to annihilate it. They cross the boundary between civilization and the barbarous primitive.

Ibid. 309.

- 197 'The intention to rob (*animus furandi*) is not required [for the crime of Piracy]. Acts of Piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain.' *Year Book of the International Law Commission*, cited in Halberstam, 'Terrorism on the High Seas', 278. See Myres S. McDougal, and William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven: New Haven Press, 1987), 811.

- 198 Dubner, *The Law of International Sea Piracy*, 63. Compare this with Crockett:

Under traditional laws of piracy, precedents may be found for treating some acts closely associated with States and, particularly, acts associated with groups organized along political lines as piratical. Second, there are too many acts associated with a State and acts which can be described as "political", which upon serious reflection, should not be exempted from the common jurisdiction [of Piracy].

Clyde H. Crockett, 'Toward a Revision of the International Law of Piracy', *De Paul Law Review*, 26 (1976), 78–99 at 98.

Positivism towards an objective neo-Naturalism, the status of Original Personality dependent upon compliance with *ius naturale*. Such a rhetorical stratagem would signify not only the 'public' nature of Piracy but also the criminal nature of anti-systemic movements that engage in terrorist 'crime'. Taken to its furthest degree, the iterability between Terrorism and Piracy would make all 'terrorists'—or, more generally, all insurgents against a 'lawful' regime—'pirates', creating the possibility of new forms of 'criminal governance' within insurrectionary or civil war domains.¹⁹⁹

The work of Jackson on 'Quasi-States', or 'Juridical States', is pivotal in this regard.

Most African countries, even the smallest ones, are fairly loose patchworks of plural allegiances and identities somewhat reminiscent of medieval Europe, with the crucial difference that they are defined and supported externally by the institutional framework of sovereignty regardless of their own domestic conditions. Ironically, they are 'medieval' and 'modern' at the same time.²⁰⁰

For Jackson, Juridical States are a striking confirmation of radical Recognition theory, discussed in Chapter Two. These States do not exhibit the 'empirical constituents by which real states are ordinarily recognised. [Juridical States] frequently lack the characteristics of a common or public realm; state offices possess uncertain authority, governing organizations are ineffective, and plagued by corruption, and the political community is highly segmented ethnically into several 'publics' rather than one.'²⁰¹

199 Green makes this point explicitly:

Such a restrictive formulation [of 'private acts'] arises from [the Harvard Group's Rapporteur] Professor Bingham's value judgement that a broader interpretation of piracy could lead to justification of third party intervention to aid incumbent governments in what later came to be called 'wars of national liberation'. A non-articulated, but nonetheless present, premise of Bingham's inclination was the assumption that anti-colonial movements were necessarily benign, majoritarian and directed to the establishment of liberal democracies within the newly independent States in which they arose. For him, the history of the formation of the United States provided an unquestioned and almost, if not completely, universal paradigm. The nihilistic terrorist, as distinct from the freedom fighter, was a person, and a concept, not within the comprehension of Professor Bingham's philosophy.

Green, 'Terrorism and the Law of the Sea', 227–8.

200 Robert H. Jackson, 'Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence in the Third World', *International Organization*, 41/4 (1987), 519–49 at 528.

201 Ibid. 526–7. Juridical States 'are states mainly by international courtesy', correlating with the concept of Juridical Statehood, which is 'derived from a right of self-determination—negative sovereignty—without yet possessing much in the way of empirical statehood, disclosed by a capacity for effective and civil government—positive sovereignty'. Ibid. 528 and 529. See below, this chapter.

Juridical States are, in turn, subject to infinite sub-division. 'Violence in illegal markets is a mechanism of dispute resolution',²⁰² accordingly, the legitimization of TCOs is achieved increasingly through the establishment of effective 'regulatory authority' over proliferating insurgent 'trans-border' economies.²⁰³

While antagonisms exist with regards to the state's official regulatory authority over these regional economies, complicity is also evident insofar as the state is dependent upon these regional economies for rents and the means of redistribution. Likewise, while these networks can be described as trans- or sub-national, they make important, or even essential contributions to the national political economy. Moreover, while these regimes of power and wealth may be described as novel realms of thought and action, they are none the less inscribed in the same logical—or epistemological—order as that of the nation-state.²⁰⁴

There are two issues of outstanding interest with regards to the Juridical State. Firstly, the originary ground(s) of the Quasi-State is the site of the colonial difference;²⁰⁵ 'Juridical Statehood is a product of de-colonisation'.²⁰⁶ Following the establishment of the US-led era of hegemonic International Law the de-colonisation of the rival hegemonic/colonial blocs became a central objective of the multi-lateral mechanisms of global governance, primarily the United Nations.²⁰⁷

202 Passas, 'A Structural Analysis of Corruption', 52.

203 Duffield, *Global Governance and the New wars*, 140–6 and 171–8.

204 Janet Roitman, 'New Sovereigns? Regulatory Authority in the Chad Basin', in Thomas M. Callaghy, Ronald Kassimir and Robert Latham (eds), *Intervention and Transnationalism in Africa: Global-Local Networks of Power* (Cambridge: Cambridge University Press, 2001), 240–63 at 241, *passim*.

Paralleling the de-legitimation of the extant political order, the old instruments and institutions of economic organization are also obsolete. In one country after another not only is the 'underground'—the informal, unrecorded and unregulated—part of the economy growing faster than the official part, but in many countries of the developing world it is now larger in absolute terms. It is not a matter merely of unlicensed street vendors but of entire large-scale production units that are operating in an environment over which the formal state apparatus has no control. It was not accidental that, in the past, insurgencies thrived in precisely those societies where the de-legitimation of the state was paralleled by the spread of underground economic authority. And it will not be accidental that, in the future, the spread of the underground economy will be a political and financial breeding ground for the forces most anxious to challenge the status quo distribution of power and wealth.

R.T. Naylor, 'The Insurgent Economy: Black Market Operations of Guerrilla Organizations', *Crime, Law and Social Change*, 20 (1993), 13–51 at 47.

205 Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Brill/Martinus Nijhoff, 2004), 101–69.

206 Ibid. 102.

207 See above, Chapter One.

This alteration in the international political order necessitated a parallel transformation of International Law; the hitherto subjective (political) preference for de-colonisation was now constituted as the objective (legal) *right* of self-determination of colonial peoples.²⁰⁸

The outlawing of colonialism took place took shape primarily within the United Nations. The [institutional] practice of the world organization transformed the political claims to self-determination into a formal right of colonial peoples. The right to self-determination was the legal crowbar that was used to break up existing colonial empires. Self-determination in fact constituted a title to independence by right.²⁰⁹

Consequently, the former 'colonies of sub-Saharan Africa gained their independence as a result of a revolution in legal thought, which disregarded the traditionally important position of effectiveness in international law.'²¹⁰ In this way, de-colonisation 'may be seen as the replacement of positive sovereignty [effectiveness] by the essentially negative right [non-interference] to self-determination.'²¹¹ For this reason, the Juridical State is frequently identified with the *Failed State*.

State failure, as it is presently witnessed in sub-Saharan Africa, is the result of a normative revolution that caused a sudden swing from [the legal doctrine of] effectiveness to legality [self-determination as right] in the laws governing statehood. This swing was necessary to facilitate decolonisation but it also created States that reveal a fundamental lack of factual capacity or power. This lack of capacity constitutes the essence of State failure.²¹²

Under the doctrine of effectiveness, the objective state of effective control over and effective monopolisation of violence within a designated territory has historically served as the necessary precondition for the lawful international recognition of legal personality.

Effectiveness basically constitutes the notion that in the case of a dispute over the existence of a certain legal title the factual situation should be decisive... The main reason, therefore, for categorizing a State as a *failed* [Juridical] State is this striking gap between ideal and reality... State failure basically seems to constitute an inability to exert the necessary domestic political control.²¹³

208 Ibid. 1–169 and 367–82.

209 Ibid. 367.

210 Ibid. See also *ibid.* 127–34, 147–8 and 163–7.

211 Ibid. 142.

212 Ibid. 7.

213 Ibid. 26 and 92.

However, precisely because de-colonisation and the attendant 'revolution in legal thought' were accomplished within *la longue duree* of the Capitalist World-System, the resultant 'post-colonial' State—in reality, the neo-colonial State—was ontologically constituted by the heterogenous logic of the Modern World-System. Juridical Statehood serves as the juro-political corollary to that axial division of global labour constituted by the Capitalist World-Economy—the continuation of neo-Colonialism by other means.

This development established a vital linkage with the second major issue of concern, the subordination of the newly (neo-) de-colonised State to the 'presence' of Divisible Sovereignty, signified by the extreme iterability governing the relationship between the Juridical State and the TCO. Far from constituting a symptom of 'pathology', TCOs may be plausibly read as signs of alternative forms of juro-political organisation precisely to the degree with which they are objectively capable of exercising effective occupation and control over a territorial unit, and, therefore, of having been invested with the requisite degree of legitimising authority.²¹⁴

VIII The Modern World-System and Shadow Networks

A caveat needs to be entered at this point. The structural time of *la longue duree* is secular, not cyclical; in this way, History never repeats itself. It would be a methodological error to suppose that the emergence of the Juridical or Quasi-State constitutes the re-occurrence of the early modern.²¹⁵ Deconstruction, however, is concerned with similitude; it seeks to de-stabilise all fixed or essential(ist) meanings through the subversive conjunction of oppositional terms via *différance*. Therefore, when we contemplate the Juridical State, we are not signifying a repetition of structural time, but announcing the presence of an ironical awareness of similitude, the de-construction of Euro-centric and Universalist essentialisation of the construct of both the 'State' and 'Sovereignty'. Sovereignty, as

²¹⁴ Duffield, *Global Governance and the New Wars*, 128–201.

²¹⁵ Employing similar reasoning, Bayart has concluded that there is a strong possibility that sub-Saharan Africa is returning to the heart of darkness. This, we must repeat, is not synonymous with 'tradition' or 'primitiveness', but is related to the manner in which Africa is inserted in the international system through economies of extraction or production [i.e., original accumulation] in which many of the leading operators are foreigners, whose local African partners have to a considerable degree based their careers on the use of armed force... The context in which this occurs is a modern one. It cannot be disassociated from the process of globalisation of the planet, one of the key aspects of which is... an unrestrained tendency towards economic and financial liberalisation. Criminal organizations are certainly not slow to take advantage of this and to globalise or at least 'de-localize' their strategies. From this point of view, Africa's comparative advantage, although limited, is a substantial one.

Jean-Francois Bayart, 'Conclusion', in Jean-Francois Bayart, Stephen Ellis, and Beatrice Hibou, *The Criminalization of the State in Africa* (London: The International African Institute, 1997), 114–16 at 114.

the Master-Sign of the State, de-notes a unifying and grounding Presence: 'So here you have a concept which is in principle secularised, but for which the very realization means the inheritance of theological meaning.'²¹⁶ The absence of any unifying or totalising presence evident within the Quasi-State not only evokes the radical nominalism of contemporary Constitutive and Recognition theory, but also acts as the necessary foreground for the eventual de-construction of the State itself. This is completely consistent with the secularity of *histoire structurale*; the originary ground for the temporal emergence of the subversive Patrimonial State is the heterogeneous logic of both the Modern World-System and the Capitalist World-Economy. In other words, the contemporary emergence of the Juridical State is a sign of the colonial difference.

The symbiotic convergences between criminal cartels and trans-national economies underscore the necessity of understanding intra-state developments as encapsulated within inter-state developments; the transversal between the micro-level to the macro-level transferred to the global level of analysis. By positing a structural equivalence between the North and the South-or, the 'Core' and the 'Periphery'—World-Systems Analysis provides us with a vital interpretative model with which to conceptualise what Nordstrom has identified as 'shadow networks': 'large-scale systems of affiliation and exchange that occur apart from formal state structures.'²¹⁷

The symbiotic convergences between criminal cartels and trans-national economies underscore the necessity of understanding intra-state developments as encapsulated within inter-state developments; the transversal between the micro-level to the macro-level transferred to the global level of analysis. Positing a structural equivalence between the North and the South-or, the core and the periphery, provides us with a vital interpretative model with which to conceptualise what Nordstrom calls 'shadow networks', 'large-scale systems of affiliation and exchange that occur apart from formal state structures';²¹⁸ the 'architecture of the global economy features an asymmetrically interdependent world, organised around three major economic regions and increasingly polarized along an axis of opposition between productive information-rich, affluent areas, and impoverished areas, economically devalued and socially excluded.'²¹⁹ In World-System

216 Jacques Derrida, 'A Discussion with Jacques Derrida', *Theory and Event*, 5/1 (2001), para. 49.

217 Carolyn Nordstrom, 'Out of the Shadows', in Callaghy, Kassimir and Latham (eds), *Intervention and Transnationalism in Africa*, 216. Davidson has argued that the alleged 're-appearance' of tribalism and tribal clientelism within African Juridical States is not actually a trans-historical constant, but is a contemporary development in response to peripheralisation/colonisation within the Modern World-System. Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (New York: Three Rivers Press, 1993), 243–65.

218 Nordstrom, 'Out of the Shadows', 216. See also Carolyn Nordstrom, 'Shadows and Sovereigns', *Theory, Culture & Society*, 17/4 (2000), 35–54, *passim*.

219 Castells, *End of the Millennium*, 145.

terms, the convergence of core zone states via trans-national shadow economies strictly parallels the exploitative assimilation of peripheral and semi-peripheral States within the World-System; 'The governance networks linking North and South... largely reflect the internationalisation of [northern domestic] public policy and reflect the South's subordination.'²²⁰ For Duffield,

In terms of the international North-South flows and networks, there is a noticeable duality. While patterns are uneven and great differences exist, the shrinkage of formal economic ties has given rise to two opposing movements. Coming from the South, there has been an expansion of trans-border and shadow economic activity that has forged new local-global linkages with the liberal world system and, in so doing, new patterns of actual development and political authority—that is, alternative and non-liberal forms of protection, legitimacy and social regulation. Emerging from the North, the networks of international public policy have thickened and multiplied their points of engagement and control. Many erstwhile functions of the nation state have been abandoned to these international networks as power and authority have been reconfigured. The encounter of the two systems has formed a new and complex development-security terrain.²²¹

As Castells has famously argued,

A new world, a Fourth World, has emerged, made up of multiple black holes of social exclusion throughout the planet. The Fourth World comprises large areas of the globe, such as much of Sub-Saharan Africa, and impoverished rural areas of Latin America and Asia. But it is also present in literally every country, and every city, in this new geography of social exclusion.²²²

The necessary linkage between shadow networks and a globally fragmenting political pluralism is provided by the two signature characteristics of the Modern World-System itself. These are: (i) a radically heterogenous interstate system that yields an endless proliferation of trans-national actors and identities;²²³ and (ii) a strict verticality of North-South flows.²²⁴ The recent permutations within both

220 Duffield, *Global Governance and the New Wars*, 8.

221 Ibid. 9. Emphasis added.

222 Castells, *End of the Millennium*, 164. Emphasis added.

223 Immanuel Wallerstein, 'The Inter-State Structure of the Modern-World System,' in Steve Smith, Ken Booth and Marysia Zalewski (eds), *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), 87–107 at 89.

224 Duffield, *Global Governance and the New Wars*, 3–4:

If globalisation has a meaning in this context it is the consolidation of several distinct but interrelated economic systems as the core of the formal international economy. Moreover, rather than continuing to expand in a spatial or geographical sense, the competitive financial, investment, trade and productive networks that link these regionalised systems have been *thickening and deepening* since the 1970s. Although there are, of course, many differences that separate them, these core regionalised systems of

the Modern World-System and its economic corollary the Capitalist World-Economy have spawned entire classes of anomalous political entities that resist orthodox analysis. Ambivalent terminology signifies doctrinal dissent: 'patrimonial states'; 'rogue states'; 'weak states'; 'failed states'; 'states of concern'; 'quasi-states'; 'deep states'; and 'dual states'.

The geo-spatial (sub-) divisions of an unevenly integrated World-System serve as the necessary precondition for the emergence of global shadow networks. Duffield's tantalising phrase 'new and complex development-security terrain' provides the venue for the direct insertion of extra-judicial bodies and criminal cartels into the primary patterns of global governance as the new bearers of an (apparently) infinitely sub-divisible sovereignty.

While antagonisms exist with regards to the state's official regulatory authority over these regional economies, complicity is also evident insofar as the state is dependent upon these regional economies for rents and the means of redistribution. Likewise, while these networks can be described as trans- or sub-national, they make important, or even essential contributions to the national political economy. Moreover, while these regimes of power and wealth may be described as novel realms of thought and action, they are none the less inscribed in the same logical—or epistemological—order as that of the nation-state.²²⁵

These shadow networks constitute an outstanding example of 'blowback', the re-direction of hostile covert activities back towards the sending State.

The threat of an excluded South fomenting international instability through conflict, criminal activity and terrorism is now part of a new security framework. Within this framework, underdevelopment has become dangerous... On the one hand, evidence suggests that the South has been increasingly isolated and excluded by the dominant networks of the conventional global informational economy... At the same time, however, formal economic exclusion is not synonymous with a void, far from it. The South has effectively reintegrated itself into the liberal world system through the spread and deepening of all types of parallel and shadow trans-border activity.²²⁶ This represents

the global informational economy are here figuratively described as the 'North'. Correspondingly, the areas formally outside or only partially or conditionally integrated into these regional networks are loosely referred to as the 'South'. The inclusion of the South within the conventional economic flows and networks of the global economy—even when raw materials and cheap labour are available, even as unequal and exploited subjects—can no longer, as in the past, be taken for granted.

225 Roitman, 'New Sovereigns? Regulatory Authority in the Chad Basin', 241.

226 This is, of course, perfectly consistent with the nature of the World-System itself. 'The world system is subject to a simultaneous process of globalisation and loss of precise territorial definition, which may not lead to the eclipse of the state as an organ of power, but which is most surely leading to the development of trans-national relations between societies.' Jean-Francois Bayart, Stephen Ellis, and Beatrice Hibou,

the site of new and expansive forms of local-global networking and innovative patterns of extra-legal and non-formal North-South integration.²²⁷

The scope for and significance of shadow networks is directly proportionate to the degree that the Modern World-System is identical with the World-Economy. Herein may lay the explanation for the recurrence of divisible sovereignty within the peripheral zone, the site of the geo-spatial and historical emergence of the colonial difference: Divisible Sovereignty *precisely is* the extra-statist and extra-juridical governance of a World-Economy that is constituted equally by sub-system legal and 'shadow' economies.

Here, highly subversive alternatives to the conventional models of Modernity and Development begin to suggest themselves. It is submitted that a (potentially) new index for the qualitative measuring of levels of national development is the degree to which the extra-juridical complexes have been either effectively co-opted by or integrated into the *de jure* Nation-State. Far from eliminating 'organised crime,' Developed States have merely been (comparatively) successful in rendering cartels institutionally invisible, through a strictly teleological trajectory of historical development: from extortionist models of cartel function to the parasitical and, finally, the symbiotic.²²⁸ Conversely, a 'Developing' State

'From Kleptocracy to the Felonious State?', in id., *The Criminalization of the State in Africa* (London: The International African Institute, 1997), 1–31 at 9.

227 Duffield, *Global Governance and the New Wars*, 2 and 5.

228 Passas, 'A Structural Analysis of Corruption', 51.

We can expect "quiet", effective, and well-organized illegal markets and corrupt practices in exactly those countries that are conventionally regarded as corruption free. Whenever outlaws commodities or illegal services are in high demand and whenever criminogenic asymmetries are at play, relatively stable and strong governments are fertile ground for corrupt practices facilitating the most sophisticated and best criminal cartels.

The highest stage of juro-political evolution of the criminal cartel is the 'symbiotic phase.' In this phase,

criminals become an integral, functional part of the society off which they formally preyed, and the distinction between illegal and legal activities starts to blur. Rather than their income and wealth being a direct deduction from that of legitimate formal society, the income and wealth of both increase together as the criminal sector supplies goods and services which, for a variety of reasons, the formal society's legitimate enterprises cannot be seen as providing. This symbiosis goes beyond the merely economic. It is a commonplace observation that much of the covert funding for political parties in those democratic systems that impose limitations on campaign financing comes from or through underworld sources... [These] links are more than financial. More overtly corrupt regimes... can actually endorse the stranglehold of powerful criminal syndicates... on a wide range of businesses in return for those criminal groups deploying their muscle to keep political rivals of the government at bay.

Naylor, 'The Insurgent Economy', 21. Here, the 'border' between the core and the periphery is signified not by the absence of crime but, rather, its comparative *invisibility*.

may be defined as one in which adequate mechanisms of assimilation are lacking, rendering criminal governance transparent; for example, the tributary/exaction model of African warlord-ism as a visible system of protection/taxation.²²⁹

Governance is both extra-governmental and anti-hierarchical: while it encompasses formal institutions, it also expressly includes all private actors who utilise command mechanisms in regulating the production and distribution of outcomes.²³⁰ The issue of *private agency* is of central importance. Governance is also inextricable from the wider phenomenon of legitimacy, voluntary obedience to consensus-generated inter-subjective systems of rules. As we have already shown in our cursory discussion of the Sicilian Mafia, although not necessarily supported by formal legal authority, legitimacy exists wherever some sort of system of governance guarantees the completion of 'those tasks that have to be performed to sustain the routinized arrangements of prevailing order and that may or may not be performed by government.'²³¹ This thoroughly pragmatic nexus between legitimacy and outcome-performance creates 'authority', both private and public, consistent with our discussion above. It is at precisely this juncture that 'legal illegality' emerges; the rise of legitimate private authority invests extra-judicial, or non-legal, actors with the symbolic construction of political order. This signifies that covert agencies and actions are an integral part of the practical exercise of governance within both national and trans-national spaces. Global governance is never politically neutral or morally innocent as it is always highly prone towards the fostering of shadow networks; throughout the late 20th century, 'there has been a noticeable move from the hierarchical, territorial and bureaucratic relations of government to more polyarchical, non-territorial and networked relations of governance.'²³² A primary example of this is what Duffield has labelled 'the liberal peace', which is

229 As with so many other terms evoking global governance, 'warlordism' eludes precise definition. Rich has identified it in broad World-System terms, as a 'product of the fracturing of sovereign state structures and reflects the uneven integration of regimes, especially those in the developing world, into the modern global economy.' He interprets it as an interstitial or transversal phenomenon, denoting a

continuum of warlordism [that] also fits into a wider series of classifications of conflict. At the most developed end it blurs into a regional or secessionist movement that may be able to develop nationalist or proto-nationalist political aspirations. At the lower end of the continuum it blurs into a variety of forms of low-intensity conflict such as organized gangsterism and brigandage.

Paul B. Rich, 'The Emergence and Significance of Warlordism in International Politics', in id. (ed.), *Warlords in International Relations* (New York: St. Martin's Press, 1999), 1 and 15.

230 See above, Chapter One.

231 James N. Rosenau, 'Governance, Order, and Change in World Politics', in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), 1–29 at 4.

232 Duffield, *Global Governance and the New Wars*, 11.

part of the complex, mutating and stratified networks that make up global liberal governance. More specifically, liberal peace is embodied in a number of flows and modes of authority within liberal governance that bring together different *strategic complexes* of state-non-state, military-civilian and public-private actors in pursuit of its aims. Such complexes now variously enmesh international NGOs, governments, military establishments, IFIs, private security companies, IGOs, the business sector and so on. They are strategic in the sense of pursuing a radical agenda of social transformation [i.e., 'Developmentalism'] in the interests of global stability. In the past, one might have referred to these complexes as representing the development or aid industry; now, however, *they have expanded to constitute a network of strategic governance relations that are increasingly privatised and militarised*.²³³

Within this general convergence of 'strategic complexes' and shadow networks, it is the element of 'private' that most concerns us, causing a transversal shift from licit to illicit or 'shadow' forms of governance. This 'privatisation of power,' which is identical to corruption,²³⁴ signifies the originary site of colonial difference; the temporal emergence of the Juridical State constitutes a repetition, specifically the 're-incorporation' of the neo-colonial peripheral zones into the Capitalist World-Economy. This may be seen on both the episodic and on the structural level of analysis.²³⁵ For the episodic, we may cite the (re-) occurrence of civil wars within the peripheral zones, the geo-spatial domains of European Colonialism. Contrary to popular perceptions of irrationalism, civil wars constitute an alternative mode of production and distribution, furthering an array of rational economic agendas which may include: pillage; the extraction of protection money; the monopolisation of trade networks; coerced labour; forcible land re-settlement and the

233 Ibid. 12. Emphasis added.

234 Bayart, Ellis, and Hibou, 'From Kleptocracy to the Felonious State?', 2:

Corruption (or, more precisely, the combination of positions of public office with positions of accumulation) was always a feature of the mercantilist [i.e., 'protectionist'] trade system which was at its zenith in Africa from 1930 to 1980. The phenomenon may be identified at the heart of colonial regimes and nationalist movements, as well as of the postcolonial states which, in certain cases, gave rise to the literal kleptocracies in the 1970s and 1980s, such as Zaire, Nigeria, Sierra Leone, Liberia, and Somalia.

235 In a thoroughly self-referential manner, corruption-as-privatisation is used to re-affirm the identity of the Juridical State as the Failed State precisely through that absence of effective governmental control that has resulted from the earlier radical privatisation.

Another particular feature of State failure is the prominence of the 'private sector,' which has bled the public sector white in terms of revenue and is one of the main causes for the faltering of the re-introduction of state structures. It is a common feature of sub-Saharan African States to display black market economies that exceed the turnout of the official economy. Control over natural resources rests with the small groups of individuals taking revenues which normally would have been destined for public purposes.

Kreijen, *State Failure, Sovereignty and Effectiveness*, 88.

expropriation of natural resources; the mass theft of aid supplies; and the forces subsidisation of military expenditure.²³⁶ Conversely, the Modern World-System invests civil wars with a degree of both economic and political functionality; the increased flow of international trade and rates of foreign direct investment may stimulate internal violence by 'encouraging a regime to displace people from resource-rich areas.'²³⁷ For the structural, we may consider the systemic 're-incorporation' of the peripheral zones into the Modern World-System; this phenomenon has been greatly accelerated by the transition of the US hegemonic cycle from the ascendant A-Phase to the contracting B-Phase. As discussed in Chapter One, multi-lateral global governance, especially in the form of the economic institutions of the United Nations regime, has been a central pillar of US hegemony since the end of the Second World War. More recently, there has been a structural shift towards Neo-Liberalism and privatised de-regulation as the primary model of 'good' governance. This, in turn, has stimulated a process of re-linkage between the contemporary Modern World-System and the remnants of the brokerage comprador classes, now re-constituted as the nationalist elites of the neo-colonial States. The retention of these 'neo-comprador classes' as separate political and economic entities within the post-independence Juridical States serves as the necessary pre-condition for the emergence of a semi-institutionalised system of shadow networks, or 'parallel government'.

Ever since the start of the colonial period, access to [the Juridical State] has been turned more or less into a source of private benefit. Today, the simultaneous erosion of government and the de-legitimation of public authority have led further, to the confiscation of power by private actors... The disorganized or even anarchic condition of public administration [within the Juridical State] is conducive to the development of informal

236 David Keen, *The Economic Functions of Violence in Civil Wars* (Oxford: Oxford University Press, 1998), Adelphi Paper 320, 15–17. 'The apparent "chaos" of civil war can be used to further local and short-term interests [both from the top-down and from the bottom-up]... War is not simply a breakdown in a particular system, but a way of creating an alternative system of profit, power, and even protection.' Ibid. 11.

237 Ibid. 69. Sudan is, of course, the outstanding contemporary example of this. Parallel to the Capitalist World-Economy, civil war may serve rational economic purposes within regional economies.

War and anarchy do not have only de-stabilizing effects; sometimes they may serve to stimulate economic and financial activity in neighbouring countries. Thus, a significant part of the economic dynamism of Cote d'Ivoire is attributable to revenues derived from wars in Sierra Leone and, more particularly, Liberia (trade in hardwood, drugs, weapons, smuggled goods, stolen cars, gold, diamonds and rubber) and from local management of the economic affairs of UNITA, the Angolan movement which uses Abidjan as a rear base for its diamond business.

Beatrice Hibou, 'The "Social Capital" of the State as an Agent of Deception, or the Ruses of Economic Intelligence', in Jean-Francois Bayart, Stephen Ellis, and Beatrice Hibou, *The Criminalization of the State in Africa* (London: The International African Institute, 1997), 69–113 at 103.

networks. These in turn become a means by which public authority, in fact lying in private hands, is actually exercised. This then emphasizes those aspects of the state which can be described as existing in a shadow world. At every level and in every sector, this mode of operation in parallel is acquiring ever more durable roots... The end result is the emergence of a parallel government but without the official or formal government ceasing to exist. In fact, this element of duality has become integral to the system.²³⁸

This convergence of shadow structures, both economic and political, is exacerbated by the injection of dogmatic Neo-Liberalism into the Juridical State, this 'in exchange for' multi-lateral recognition and integration into the Capitalist World-Economy. Neo-Liberalism as de-regulatory privatisation provides both a transnational incentive for and rationalisation of indigenous trends and currents.

Several of the African governments which have gone furthest in this process of de-regulation are characterized by the existence of a hidden and collective structure of power which surrounds, and even controls, the official tenants of state power. Hidden powerbrokers of this sort are able to use to their advantage the privatisation of legitimate means of coercion, and even to use with impunity private and illegitimate organs of coercion in the form of para-military organizations or even criminal gangs. They exploit for their own profit public enterprise and financial institutions or regulatory bodies such as marketing boards, by means including privatisation, fraud and smuggling through the use of intermediaries, front-men and personalized networks.²³⁹

Consequently, we 'may observe in Africa today that, contrary to the teachings of the Neo-liberal rubric, measures of privatisation and financial liberalization can lead to the plundering of the economy as widespread as did the processes of nationalization and perhaps in an even less orderly manner.'²⁴⁰

238 Ibid. 96.

239 Bayart, Ellis and Hibou, 'From Kleptocracy to the Felonious State?', 20–1.

240 Hibou, 'The "Social Capital" of the State as an Agent of Deception', 71. Of special importance here is the privatisation of public enterprises and the liberalisation of national banking systems, with the concomitant proliferation of national and international fraud. Ibid. 71–6. Incurable, both the IMF and the World Bank are solely concerned with the financial condition of the public sectors, facilitating the un-regulated proliferation of private financial services and economies. Furthermore, SAPs expressly require the at least partial privatisation of vital public services and domains. Ibid. 97–8. If perversity can be defined as the unyielding commitment to certain failure, then such perversion cannot be accidental. An

examination of the actual consequences of structural adjustment, as opposed to a study of its intended benefits, reveals the extraordinarily high degree to which reform measures have been appropriated by African actors. Liberalization measures have been so effectively integrated into the political economy and the particular trajectories of African economies that they have reinforced the very tendencies which they were supposed to counter, including extra-legal developments and the appropriation of eco-

For Marx, 'primitive accumulation plays approximately the same role in political economy as original sin does in theology.'²⁴¹ Within the terms of *la longue duree*, the Juridical State, trans-versed by shadow networks and parallel governments—the signs of Divisible Sovereignty—signifies the (continuing) presence of primitive or original accumulation within wholly contemporary processes of state formation. Original accumulation—or, to employ Harvey's terminology, 'accumulation by dispossession'²⁴²—as the dangerous supplement to the Capitalist World-Economy presents us with a fundamental de-constructionist dilemma: how can International Law achieve self-grounding within an originary that is inherently violent and extra-juridical, if not overtly 'criminal', in being? This dilemma—eternally present, perpetually deferred, and perennially unresolved—lies at the centre of the Grotian discourse 'Concerning the Indies' and virtually wrecks it with discursive and rhetorical incoherence.

IX Grotius Contra Gentili: *Res Extra Commercium Contra Iurisdiction*

For Wallerstein, the 'third pillar of liberal geo-culture' is the 'depoliticised incorporation of the dangerous classes, which might otherwise be called the taming of the anti-systematic movements.'²⁴³ Within terms of Grotian discourse, operating within the arche-trace of the Modern World-System, this is constituted by the de-legitimation of Piracy. This rhetorical manoeuvre, in turn, takes place on three levels: (i) the symbolic validation of the statist monopolisation of violence as a means of neutralising the revolutionary potential of organised maritime labour;²⁴⁴ (ii) the taxonomic re-classification of Privateering as a 'lawful' State practice as the logical corollary of the invalidation of Piracy as a 'national enterprise';²⁴⁵ and,

conomic resources by certain actors for purposes connected with the political and social control of populations.'

Ibid. 70.

241 Karl Marx, *Capital: A Critique of Political Economy, Volume One*, with Introduction by Ernest Mandel, trans. Ben Fowkes (London: Penguin Books, 1990), 873.

242 See above, Chapter Two.

243 Wallerstein, 'The Inter-State Structure of the Modern-World System', 95.

244 Perotin-Dumon, 'The Pirate and the Emperor', 218:

The more ambitious [military] tactics of protecting ships through convoys and cleaning out the freebooter's retreats could only be realized with much difficulty over an extended period of time. What appears to have been more effective in practice was attracting merchants into the commercial orbit of the State. In order to work, the measures and privileges... had to make commerce more profitable and safer with rather than without the tutelage of the State. Further, the State had to encourage the formation of political blocs that were hostile to pirates and had an interest in their repression.

245 The 'suppression of piracy within national frameworks is important as an indicator of new State power; in particular the array of policies used to subdue pirates—including punishment or pardon, regulation or toleration—shows the concrete limits within which a State was able to assert itself.' Ibid. 199. See Zahedieh, 'A Frugal and Prudential and Hopeful Trade', *passim*; Nuala Zahedieh, 'Trade, Plunder, and

(iii) the marginalisation of all international legal personalities, including non-European States, that did not conform to the taxonomic re-classifications, through the withholding of legal recognition.²⁴⁶

As was ordinarily the case with Grotian discourse, the more immediate solution to the problem of 'piratical sovereignty' lay within a taxonomic re-classification via Natural Law; here, 'the rogue Seaman' (i.e. the Pirate) as, respectively, 'bandit', 'brigand' or, most potently, as politicised 'rebel'. The re-classification of both sets of maritime predator through the application of *ius naturale* served as a means of discursively establishing a self-legitimising parameter governing the juro-political 'space' of the lawful exercise of organised maritime violence. The sign-system of non-infinitely divisible sovereignty lay within the taxonomic re-categorisation of the pirate/bandit/brigand/rebel as *Pirate omnium mortalia hostes communes*. But, once again, the presence of competing ontologies yields a surfeit of textual fissuring.

Prima facie, *De Indis* appears to be largely derivative of Gentili's Humanist *De Iure Belli Libris Tres* in its treatment of Piracy: 'War on both sides must be public and official and there must be sovereigns on both sides to direct the war.'²⁴⁷ The juridical determination of an illicit act of Piracy is itself governed by the prior determination of the international legal identity of the entity commissioning the predatory action; in this way, Piracy is read 'down' from the over-arching issue of legal personality.

It is possible to conclude that Gentili in 1588 took an argumentative position, supported with an advocate's brief, that 'piracy' was not a matter of permanent war with communities pursuing violent tax collections at sea or basing part of their economy on booty seized from their neighbours [i.e., the 'pariah entrepreneur' States Malay and the Barbary Coast]. 'Piracy' to Gentili was apparently any taking of foreign life or property not authorized by a sovereign, synonymous with brigandage or robbery on land.²⁴⁸

Economic Development in Early English Jamaica, 1655–89', *Economic History Review*, 2nd ser., XXXIX (1986), 145–68, *passim*.

- 246 J.E.G. de Montmorency, 'The Barbary States in International Law', *Transactions of the Grotius Society*, 4 (1918), 87–93, *passim*; Jorg Manfred Mossner, 'The Barbary Powers in International Law (Doctrinal and Practical Aspects)', in C.H. Alexandrowicz (ed.), *Grotian Society Papers 1972: Studies in the History of the Law of Nations* (The Hague: Martinus Nijhoff, 1972), 197–221, *passim*.

Every State is under an international obligation to suppress piracy within its own territorial jurisdiction. If a State should fail to do so or should associate itself persistently with piratical ventures, it would certainly violate this rule. It is liable for the commission of an international tort and, in an extreme case, may even forfeit its own international personality and be treated as an international outlaw.

Georg Schwarzenberger, 'The Problem of an International Criminal Law', *Current Legal Problems*, 3 (1950), 263–90 at 275.

- 247 Alberico Gentili, *De Iure Belli Libri Tres*. Introduction by Coleman Phillipson (New York: Oceana Publications, 1964), 15.

- 248 Rubin, *The Law of Piracy*, 29.

As Piracy is, by definition, not the public act of a lawful sovereign but private criminal enterprise, pirates themselves must constitute a form of 'unlawful combatant,' their 'negative' identity (i.e. absence of 'Sovereign Presence'), serving to positively validate the 'boundaries' of legitimate sovereignty and public authority, both intra- and interstate; in essence, the relationship between Privateering and Piracy is symbiotic.

But what are we to think about those Frenchmen who were captured by the Spaniards in the last war with Portugal and were not treated as lawful enemies: they were treated as pirates [*piratae*], since they served Antonio, who had been driven from the whole kingdom and never recognized as King [of Portugal] by the Spaniards. But history itself proves that they were not pirates [*piratus*] and I say this because of no argument derived from the number and quality of the men and ships; but from the letters of their king which they exhibited; and it was that King [of France] whom they served, not Antonio; although this was especially for the interest of Antonio: a consideration, however, which did not affect their status.²⁴⁹

The 'thin' ontology of Civic Humanism grounds the identity of legal personality upon positive State action; accordingly, Gentilian discourse is based upon 'Recognition Theory,' a sixteenth-century form of Constitutive Theory.

The implications of Gentili's position were great. If it were generally accepted, whatever the weaknesses of the appeal to classical writings in support of it,²⁵⁰ that all takings were in some sense 'criminal' unless authorized by a person whose legal power to issue such an authorization were acknowledged, no degree of political organization or goal would make a 'rebel'²⁵¹ into a lawful combatant or require the application of the laws of war to the struggle against the rebel army. A tool of enormous power was placed in the hands of 'sovereigns'. The political struggle to unify France and to engage the royal power of the Stuart kings of England would be helped. Moreover, each 'sovereign' would seem to be accorded the legal power, by 'recognizing' anybody's legal status needed to license privateers or naval commanders (or withholding that 'recognition'), to determine what legal regime would be applied to any struggle between the 'sovereign' and an enemy of uncertain status. The Barbary States could be rendered 'piratical' by simply withholding recognition of his [sic] governmental position from a new Dey or 'recognizing' a rival, thus depriving the one not liked of the power to issue the Turkish equivalent of letters of marque and reprisal. Gentili's approach was clearly attractive to him as an advocate for Spain in England 1605-1608.²⁵²

249 Gentili, *De Iure Belli Libri Tres*, 22.

250 Repeated almost verbatim by Grotius.

251 Today, we would say 'Terrorist'.

252 Rubin, *The Law of Piracy*, 30.

As with Grotius, albeit in a different manner, Gentili is also plagued by the subversive logic of the dangerous supplement. In his case, the supplement at work concerns Humanist *in-divisible* sovereignty. The critical moment of self-subversion is attained at the precise instance that Gentili posits a non-iterable relationship between the *bellum iustum* of the Sovereign (Self) and the unlawful violence of Piracy/Brigandage (Other)—the presence of the Self signifies the absence of the Other.

War is a just and public contest of arms... the strife must be public; for war is not a broil, a fight, the hostility of individuals. And the arms on both sides should be public, for bellum, 'war, derives its name from the fact that there is a contest for victory between two equal parties, and for that reason it was at first called *duellem*, 'a contest of two'... In the same way we have *perduellum*, 'war', *duelles* and *perduelles*, 'enemies', whom we call *hostes*. The term *hostis* was applied to a foreigner who had equal rights with the Romans. In fact, *hostire* means 'to make equal'... Therefore *hostis* is a person with whom war is waged and is the [legal] equal of his opponent... Therefore, that definition... 'war is armed force against a foreign prince or people', is shown to be incorrect by the fact that it applies the term 'war' to the violence of private individuals and brigands.²⁵³

C. III of Book One of *De Iure Belli* is titled, 'War is Waged by Sovereigns';²⁵⁴ in other words, 'lawful' war—necessarily meaning 'just'—is the determinative sign of the presence of Sovereignty.²⁵⁵ Consequently, C. IV is titled 'Brigands do not Wage War'.²⁵⁶ The Brigand and the Pirate—taxonomically and rhetorically identi-

253 Gentili, *De Iure Belli Libere Tres*, 12.

254 Ibid. 15–21.

255 'The enemy are those who have officially declared war upon us, or upon whom we have officially declared war; all others are brigands or pirates,' says Pomponius. Ulpian uses the same language: 'The enemy are those upon whom the Roman people has officially declared war, or who have themselves declared war upon the Roman people. All others are termed brigands or pirates.' That is to say, the war on both sides must be public and official and there must be sovereigns on both sides to direct the war. This is the view both of Augustine and of the other theologians, and reason shows that war has its origin in necessity; and this necessity arises because there cannot be judicial processes between supreme sovereigns or free peoples unless they themselves consent, since they acknowledge no judge or superior. Consequently, they are only supreme and they alone merit the title of public, while all others are inferior and are rated as private individuals. The sovereign has no earthly judge, for one over whom another holds a superior position is not a sovereign. And in fact sovereigns act in accordance with this principle... Therefore it was inevitable that the decision between sovereigns should be made by arms. 'War,' says Demosthenes, 'is made against those who cannot be controlled by the laws, but judicial decisions are rendered in the case of the private citizen.' Ibid., 15.

256 Ibid. 22–6.

cal categories—are unable to wage lawful (=just) war;²⁵⁷ ergo, any such combatant is inherently 'unlawful'/ 'un-just',²⁵⁸ identical with the Rebel, the unlawful (=un-just) usurper of Sovereignty.

One thing I say by way of warning, namely that no one should understand me as speaking of other rebels than those who were subject to authority. For those who have proved false to friendship, to a treaty, or even to voluntary dependence, retain the rights of war and the other privileges of the law of nations, as all history bears witness. With pirates and rebels who violate all laws, no laws remain in force.²⁵⁹

Accordingly, war

[I]s not contrary to all human law; for example, that which provides that those who revolt from society and do not keep men's laws should be punished and forced to conform to those laws, statutes, and customs. This fact too has a bearing upon our investigation, that wars are just even though so many things come from them are evil, because their final aim is good, after the rebels have been forced to submit to reason.²⁶⁰

²⁵⁷ Ibid. 14:

'[Peace] or a treaty is not violated, unless a 'just' force of arms is employed, meaning a great force... Dio says of the Parthians: 'they have sometimes accomplished something outside of their territories by battles and sudden raids; nevertheless they cannot wage regular (*iustum*) warfare except in their home country.' This is what I mean by a 'just war'. In the same way one speaks of 'a regular army' (*iustum exercitum*) or 'a regular soldier': 'He said that they lacked nothing save liberty to make them regular soldiers (*iusti milites*). So too 'a regular leader': 'Having through some successful pillaging expeditions gained the semblance of a regular leader.' Thus we speak of a 'just' and regular battle, meaning a legitimate army as opposed to robbery and brigandage, and we use the term 'a regular victory,' meaning one that is great and decisive.

²⁵⁸ Not only in terms of *ius ad bellum*, the lawful pre-conditions for war, but also *ius in bello*, the lawful conduct of the (lawful) war.

With regard to military equipment, our thought is thus given utterance by Tacitus: 'He had laid waste the country more widely and for a longer time than is consistent with brigandage'; while Livy says: 'Rather pillaging in the manner of regular warfare (*iusto more belli*)'. Again: 'Irritation of their spirits caused by the devastation of the fields,' etc.; 'afterwards by declaring regular war (*iustum bellum*)', etc. Yet again, 'after the stratagems were detected,' etc., 'then in just and regular war,' etc. Still another time, 'rather in the fashion of brigandage than of regular (*iustum*) war'. Sallust too says: 'Rather by brigandage than battle', and in the same way Scipio called those men brigands and leaders of brigands who waged war, not in regular pitched battles, but by pillage and raids. In another passage of Livy we read: 'By the Ligurians, more properly brigands than legitimate foemen (*hostibus iustis*)'.

Ibid. 13–14.

²⁵⁹ Ibid. 24.

²⁶⁰ Ibid. 28.

Yet, as Grotius had demonstrated, Gentili's Humanist logic gives rise to 'the very strange doctrine' of the Private Avenger once the foundational principle of indivisible sovereignty is contested. If 'those who revolt from society and do not keep men's laws should be punished and forced to conform,' then the Private Avenger, the one who subverts as *differance* the difference between Public and Private violence/justice, becomes indispensable within space that supersedes prescription.

The problem with all of this, as should be obvious from a Grotian perspective, is logical circularity; the inherent contradictions embedded within both Divisible Sovereignty and commutative justice preclude the possibility of determining with requisite certainty the identity of the required legitimate sovereign. In the absence of *Civitas*, no third party would ever be bound to recognise the lawfulness of the issued letter of marque.²⁶¹ In other words, that very entity whose 'legitimate public authority' validates the demarcation between Privateering and Piracy is inherently *indeterminable*.

An even deeper logical problem lurks within the inherent discursive inadequacies of minimal moral philosophy. In the absence of a material world-state—an historical impossibility within the heterogenous world economy of the Indian Ocean—Civic Humanism proved an inadequate foundation for the 'strong' (or, merely 'non-weak') type of international public order required to universally de-legitimate piratical depredation; territorial jurisdiction was the one thing that could *not* be exercised within a regional sub-system premised upon *mare liberum*. Hegemonic surrogacy required Natural Law, in the guise of *ius cogens*, to legitimate Universal Jurisdiction,²⁶² even though enforcement was always exercised in terms of territoriality.²⁶³

261 'Gentili's "recognition" approach had its limits. Reality and the needs of commerce exposed it as not a rule for judgement by a third party or a scholar, but a tool for advocacy attractive primarily to flexible-minded lawyers and statesmen seeking a justification for actions that might not stand moral scrutiny.' Rubin, *The Law of Piracy*, 35.

262 Halberstam, 'Terrorism on the High Seas', 287–8:

The customary law of piracy can perhaps be best understood as an attempt to balance the need for universal jurisdiction against the reluctance of states to permit encroachment on their exclusive jurisdiction. States accepted universal jurisdiction over piracy because pirates (1) attacked the ships of all states indiscriminately and were thus a threat to all states, and 2) were not subject to the authority of any state, and therefore no state could be held responsible for their acts. This both created the practical need and provided the theoretical justification for the exercise of universal jurisdiction. Universal jurisdiction was justified theoretically on the ground that pirates are *hostis humani generis*, the enemies of all mankind; it was necessary pragmatically because no state could be held responsible for their acts under international law. Where the actor was not potentially a threat to all states or the act was done under the authority of a state, universal jurisdiction was denied. Thus, acts by state vessels, by recognized belligerents or by those on board a ship that continued to recognize the authority of the flag state were not piratical.

263 Perotin-Dumon, 'The Pirate and the Emperor', 202:

Piracy was rarely limited to the simple case of a state with a right to use force against

The legal problem now becomes: who possesses the practical authority to proscribe, as no Sovereign can unilaterally extend jurisdiction over that which is *res extra commercium*? And are not those privateering 'company employees' of the VOC themselves in legal jeopardy, as the lawfulness of their actions would be wholly dependent upon the purely volitional disposition (*ius voluntarium*) of the Iberian authorities to formally recognise the international legal personality of a private Dutch joint-stock company, something that 'feudal' Portugal would almost certainly be deeply loath to do? Basic intelligibility, if not systematic incoherence, is at serious risk on precisely this point. The privatisation of Public Authority, legitimising that form of Corporate Sovereignty necessary to institutionally undertake lawful privateering, ultimately works to subvert the equally necessary (but rival) notion of legitimate Sovereignty as a foundational precept of coherent international public order. The Grotian iterability between 'thick' and 'thin' ontology ultimately threatens the juridical coherence of both the international recognition and legitimation of Public Authority.²⁶⁴

In a truly remarkable passage, Rubin captures the irreconcilable tensions of this conundrum.

There are other implications of Gentili's approach. His approach to 'law' seems dominated by the ephemera of policy. If 'piracy' is criminal, by what law? Apparently, by giving to each sovereign the power of 'recognition' or 'non-recognition' to classify belligerent behaviour as 'piracy' when engaged in by licensees of a foreign government or of a political movement whose status could be denied [i.e., rebellion], the privateers or

a few isolated wrongdoers captured near its coasts. More often the crime occurred far from territorial water (or, before this notion existed, far from coasts) and belonged to the international domain. Whether national or international, piracy was the object of numerous codes and legal treatises, especially from the time when European states began to authorize and regulate attacks on the sea in the form of privateering wars. But crimes of piracy were always handled within a national legal framework. Although they belonged more properly to the domain of international law, they were brought before national admiralty courts or commerce jurisdictions.

- 264 Not surprisingly, much recent scholarship has been pushing for a blanket assertion of universal prescription upon the High Seas on the sole grounds of pragmatic expediency. 'The competing claims and interests will be, *inter alia*, the principle of state sovereignty versus the interest of the international community in preventing and controlling sea piracy and terrorism.' Dubner, *The Law of International Sea Piracy*, 161. Accordingly,

a strong argument can be made for the application of the customary law of piracy to terrorist acts on the high seas. Both the theoretical justification and the pragmatic necessity for universal jurisdiction apply to such acts. Terrorists today, like pirates of old, are a threat to all states and no state is willing to assume responsibility for their acts. Since [terrorists] do not confine their attacks to the vessels of a particular state, but attack vessels and nationals of many states indiscriminately, they are *hostis humani generis* in the truest sense. Since no state has accepted responsibility for their acts, there is no state against which claims of redress can be made.

Halberstam, 'Terrorism on the High Seas', 289.

soldiers of that government or movement could be subjected not to international law, but to domestic law... of the 'non-recognizing' sovereign. In theory, Gentili's approach, based on an advocate's twist to Roman municipal law, reached the same position as was condemned by Plutarch when considering the authority the Senate had given Pompey to suppress the Cilician 'pirates' in 68 B.C.²⁶⁵ Now any sovereign could extend his municipal law to the high seas, and possibly even to foreign lands, by authorizing his Admiral or General or other delegate to wipe out the 'pirates' there. Clearly, this broad authority could not survive the politics of Europe [i.e., the core-zone states of the Modern World-System], where the extension of one state's municipal law to the land claimed by another would result either in a system of competing empires and war 'unmodified' by the humanitarian [sic] and chivalrous laws of war that [were] generally acknowledged as necessary, or in the acknowledgement that a European sovereign of sufficient political power and claim to authority along traditional lines could not be properly denied 'recognition' as such.²⁶⁶

Here, the core-zone innovation of the 'lines of amity' provide at least a partial resolution.²⁶⁷ The ability to lawfully proscribe oceanic space is an attribute of the objective characteristics of legal personality, this wholly consistent with a 'thin' Humanist ontology.

But outside of Europe, where the competition for empire among European sovereigns and their subjects was becoming intense, the claims of non-European rulers to the legal authority of a European sovereign could be denied without those implications. And if the struggle grew too difficult to manage or the non-European too strong to ignore as a political actor or too adept at finding European allies who would 'recognize' his legal capacity to license soldiers and privateers, the European power that had overextended itself by abusing the legal tools Gentili would place in its control could simply 'withdraw' for a while to reconsider the politics and law of its position. The vistas opened up by Gentili's discovery [sic]... of a pattern of rules that could justify the most extreme action against non-European political societies, and against internal forces resisting the move towards centralized control in the monarchies and bureaucracies of European expansion, were immense and very attractive to the rising merchant classes.²⁶⁸

Both Gentili and Grotius were compelled to revisit the Universalist notion of *imperium/iurisdictio* as a means of thwarting the logic of their own dangerous supplement, the Pirate/Privateer. By grounding international Civil Society on both a 'stronger' political base—ultimately for the purpose of re-enforcing the logically indispensable categories of legitimate Sovereignty and Public Author-

²⁶⁵ See *ibid.* 9–11.

²⁶⁶ Rubin, *The Law of Piracy*, 35–6.

²⁶⁷ See above, Chapter Two.

²⁶⁸ *Ibid.*

ity²⁶⁹—Gentili brings about a fundamental breach within minimal Civil Society. Discursive and rhetorical inconsistency aside, the wholly *political* logic of this move, understood within the requirements of World-Systems Analysis, needs to be fully appreciated. The doctrinal coherence of the withholding of 'recognition' of the Original Personality of non-European (quasi-) sovereignties practicing maritime predation was expediently premised upon juridical de-legitimation as a precondition of the forcible incorporation of these States within the Capitalist World-Economy. In other words, the 'problem' of systemic indeterminacy is overcome²⁷⁰ through the fulfilment of the political objectives of the Speaker. Piracy is 'read' as a sign of Infidel 'Presence', signifying the logically correlative absence of legal personality.

Gentili's discursive objectives are readily understood in light of his Humanist origins.²⁷¹ An advocate of *mare anglicanum*, Gentili asserted territorial jurisdiction over the High Seas²⁷² as a logical extension of the Civic Humanist notion of an 'international commonwealth' or *societas gentium*.²⁷³

All this universe which you see, in which things divine and human are included, is one, and we are members of one great body. And in truth the world is one body. The Stoics maintained that the whole world formed one state, and that all men were fellow citizens and fellow townsmen, like a single herd feeding in a common pasture.²⁷⁴

269 See Ethan A. Nadelmann, 'Global Prohibition Regimes: the Evolution of Norms in International Society', in Nikos Passas (ed.), *Transnational Crime* (Aldershot: Dartmouth, 1999), 479–526, *passim*, on the necessary connection between universal jurisdiction and the prosecution of trans-national crime.

270 Or is it merely 'displaced'?

271 'Gentili implicitly thinks in terms of inter-state relations such as Italy had known since the later Middle Ages.' P. Haggemacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 133–76 at 172. For these reasons, Gentili 'cannot arrive at a solution between the problems posed by the relationship between 'natural' and 'positive' law.' Kenneth R. Simmonds, 'Hugo Grotius and Alberico Gentili', *Jahrbuch für internationale Recht*, 8 (1959), 80–105 at 100.

272 Up to one hundred nautical miles of *territorium*. G.H.J. van der Molen, 'Alberico Gentili and the Universality of International Law', *Indian Yearbook of International Affairs*, 13/2 (1964), 33–46 at 42.

273 K.R. Simmonds, 'Alberico Gentili at the Admiralty Bar', *Archiv des Völkerrechts*, 7 (1958), 2–23, *passim*.

274 Gentili, *De Iure Belli Libere Tres*, 67. This is all fully consistent with both the unitary and the trans-national status of *Civitas*. 'By the 1590s, Europe as a whole could now be seen as a society broken by civil war between nations, whose reconstruction called for a new imperialism.' Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), 65. Gentili's use of the term 'commonwealth' is a key signifier of Civic Humanism. Tuck, *The Rights of War and Peace*, 75. See Benedict Kingsbury, 'Confronting Difference: the Puzzling Durability

Significantly, States are allowed substantive extra-territoriality in their exercise of *iurisdictio*.²⁷⁵ Within Gentilean discourse, the ‘international commonwealth’ is a rhetorical device from which Universal Jurisdiction may be logically deduced rather than inductively inferred, consistent with an ascending Humanist metaphysical hierarchy.

There is jurisdiction [imperium] even over the deep; otherwise no magistrate will punish crimes committed at sea. But there is also a magistracy at sea. Such a magistracy belongs to the law of nations and its jurisdiction also; therefore [magistrates] must necessarily be everywhere where they are needed. Furthermore, as regards magistracy and jurisdiction it is evident, and is good law, that very many things are put in the hands of the sovereign on the sea as well as on the land; and these no one who sails the seas will evade. The sovereign himself will bring war upon himself, if he refuses the sea to others; and those will be justified in making war who are refused a privilege of nature [i.e., the right of innocent passage]. Because of such things a private citizen brings a suit for damages before a magistrate; therefore, one who is not a private individual makes war.²⁷⁶

Grotius was forced to confront an even more fundamental problem; the latent incommensurability between *imperium* and the Corporate Sovereignty of the VOC as a derivative of Divisible Sovereignty/*dominium*, coupled with the practical Geo-Governance demands of the Indian Ocean world economy premised upon *mare liberum*. Ultimately, there is no great problem in situating Gentili within the discursive continuity of Primitive Legal Scholarship.

Gentili’s definition of ‘war’... acts like Victoria’s and Suarez’s definition of ‘just war’, legitimising only those conflicts which do not threaten the holistic normative order. Both conditions of ‘public’ and ‘just’ are defined and limited by natural law.²⁷⁷ Nevertheless, his analysis proceeded from the assumption that the public nature of activity is logically

of Gentili’s Combination of Pluralism and Normative Judgement’, *American Journal of International Law*, 92 (1998), 713–23, *passim*.

275 Coleman Phillipson, ‘Introduction’, in Alberico Gentili, *De Iure Belli Libre Tres* (New York: Oceana Publications, 1964), 9–51 at 17 and 26–7.

276 Gentili, *De Iure Belli Libre Tres*, 92. Emphasis added. Gentili follows the Thomistic requirement of judicial process as part of Just War. See above, Chapter Six. Revealingly, alone among the primitive legal scholars, Gentili implicitly accepts the legality of the Treaty of Tordesillas. ‘[The] dispute between the kings of Castile and Portugal... was ended by the Pope of Rome, who determined what part of the new lands each might lawfully set out to possess.’ Ibid. 89.

277 Predictably, Gentili’s formulation of Natural Law follows Aristotle’s ontologically ‘thin’ version. ‘Usually [Gentili] disregards the current vague metaphysico-legal significance of [*ius naturale*], and interprets it in the sense of humanity, justice, and the best common sense of mankind.’ Phillipson, ‘Introduction’, 24.

independent of its justness.²⁷⁸ Nevertheless, they are not struggling over the terms of the natural order. Both causes [in an armed conflict] are just, or are just to differing degrees, or one party is ignorant, but there is no conflict within the worldwide scheme of justice.²⁷⁹

Grotius' only response to the *ad absurdum* consequences of his own radically iterable Text was the utterly unsatisfactory attempt to reconcile *imperium* with conveyance theory. The simultaneous positing of the Seas as both 'free' and subject to lawful jurisdiction yields a doctrinal incoherence that flows from a chaotic oscillation between contending ontological poles.

Furthermore, those authorities who maintained that the sea was a part of the Roman Empire, interpreted their own statement in such a way as to restrict that Roman right over the sea to functions of protection and jurisdiction, distinguishing it from the right of ownership. *Perhaps, too, the said authorities paid insufficient heed to the fact that it was not in virtue of a private right, but through a common maritime right possessed by other free nations also, that the Roman people were authorized to distribute fleets for the protection of sailors, and to punish pirates captured at sea. On the other hand, we must admit that it was possible for agreements to be drawn up between specific nations, stipulating that persons captured upon the sea in this or that particular region should be subject to judgement by this or that particular state; and we furthermore admit that, in this sense, boundaries upon the sea were indeed defined, for convenience in distinguishing the different areas of jurisdiction.*²⁸⁰ Such an arrangement is binding to be sure, upon the parties who have imposed legal agreement of this kind upon themselves; nor does it convert an area thus delimited into the private property of any possessor, for it merely establishes a right that has force between the contracting parties.²⁸¹

Chapter Four has demonstrated that the taxonomic classification of the High Seas as *res extra commercium* places trans-national oceanic space outside the domains of both lawful transference and prescription. Within the strict binary logic

278 This as a result of Gentili's 'Recognition Theory', which Rubin has persuasively defined as a 'primitive' form of Positivism.

279 David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27/1 (1986), 1–98 at 70. However, Kennedy may be underestimating the incompatibility between Natural Law and Civic Humanism.

280 Grotius appears to be relying upon sweeping political correlations made by the Romans themselves concerning the 'correct' relationship between Piracy and the exercise of *imperium*. See Rubin, *The Law of Piracy*, 9–18. For the Roman *ius civile*, Piracy was a 'descriptive noun for the practices of a particular land-based Eastern Mediterranean people whose views of law and intercommunity relations appear to have reflected a millennium long tradition that had become an obstacle to Roman trade and inconsistent with Roman views of the world order under Roman hegemony'. Ibid. 18. It is quite possible that Grotius excised the highlighted passages upon realising their inherently contradictory implications.

281 Grotius, *De Indis*, 237. Emphasis added.

of the inversion of the metaphysical hierarchies of Private and Public property, the supra-sovereign nature of the Ocean signifies the invalidation of any form of lawful prescription, by either Treaty or Custom. Simultaneously, the peremptory status of Natural Law as *iure gentium primum* vitiates any form of multilateral extension of 'civil' or municipal regime(s) into the domain of *extra commercium*.

In more mundane terms, it must be recalled that *Mare Liberum* was published in 1609 during the completion of Oldenbarnevelt's negotiation of 'the Spanish Truce'. Juro-political expediency rendered imperative all efforts to deny the legitimacy of conveyance of maritime title by means of conveyance. Accordingly, *De Indis* emphatically reconfirms the status of the High Seas as *res nullius*, the geo-spatial basis for the 'structural defect' in the operation and enforcement of Justice; 'It is a defect in law when in a given place there is no one possessing jurisdiction, a state of affairs which may exist in desert lands, on islands, on the ocean or in any other region where the people have no government.'²⁸² Anticipating Iberian objections, *De Indis* holds that the apparent absence of the Private Avenger in Roman law is historically attributable to the practicable form of territorial unity imposed on the High Seas through the universal Roman State/*Civitas*, the very thing absent in the case of illegitimate Spanish *imperium*.

In private warfare, if no judge is available, and if for our purpose is the recovery of our own property and the collection of the debt due us, we may seize the possessions of our adversaries... up to the point where we shall have obtained value comparable to that debt. But if this is permissible with respect to all debts owed us, then surely it is permissible with respect to damages and costs incurred in the attainment of our rights; and the same inference applies even to the dangers and cessation of profit involved, or in other... extrinsic losses and all attendant factors²⁸³... *It is easy to explain why no treatment of the question engaging our attention is found [in Roman law]. For the majesty and power of the Roman Empire were such that Rome was hardly ever troubled by a lack of judicial recourse (that is to say, by continuous lack), which is an especially weighty factor in the development of private wars.*²⁸⁴

The problem with this passage is that it completely contradicts Grotius' painstakingly assembled argument concerning *occupatio duplex* as a means of defeating the Treaty of Tordesillas and the lawful investiture of the Portuguese with exclusionary title. This blatant contradiction may be attributable either to authorial incompetence or the inherently irreconcilable tensions within the text's discursive and materialist trace(s); in the final analysis, it is more politically valuable to taxonomically classify the High Seas as *res extra commercium* in order to establish the VOC's formal compliance with the status of the (otherwise) pariah entrepreneur of the Private Avenger.

282 Ibid. 88.

283 Ibid. 133.

284 Ibid. 132. Emphasis added.

We have demonstrated that insofar as judicial discourse is lacking, private individuals are not prohibited from undertaking a war. Accordingly, when the lack of judicial recourse is of continued duration, everything that is permissible by the law of nature is permissible for private individuals. Thus it is universally acknowledged that a debt may be exacted by [private] force of arms... [Furthermore] in such cases of necessity even the power to inflict punishment concordant with the rule of justice should not be denied. Now, the lack of judicial recourse in the affair under consideration is certainly a self-evident fact. *Almost all of the events that gave rise to this war took place upon the ocean; but we have maintained... that no one can claim special jurisdiction over the ocean with respect to locality.* Furthermore, [even] if any such special jurisdiction did exist... it would be that of the East Indian rulers,²⁸⁵ who did not wish to become involved in the case and who are not recognized by the Portuguese as judges thereof. From the standpoint of locality, therefore, judicial recourse is lacking both in law and in fact. From the standpoint of the persons involved, there could have been no judge other than the Portuguese State, or ruler, or Dutch State, or ruler, since the matter is one which concerns the Portuguese and the Dutch. The Portuguese State and its ruler were the very parties who took the first step, not only in the public infliction of injury upon the Dutch, but also in initiating the war. This fact clearly deprives them of the power to serve as judges, not to mention the further consideration that, after numerous instances of perfidy, when the Portuguese... were extending merciless treatment of the Dutch envoys, any recourse to the former might justifiably have been shunned. Consequently, the proper procedure would have consisted in resorting to the Dutch State as judge, and such action was impossible because of the vast distances between the two localities involved.²⁸⁶ Thus the lack of judicial recourse was not momentary, but continuous and of long duration. The validity of this conclusion is especially evident if we bear in mind the sequence and interrelationship of the events that occurred in the East Indies, viewed as forming a coherent pattern of time and place.²⁸⁷

Not for the first time, the discursive strategy of *De Indis*, operating within the contours of the arche-trace of the Modern World-System, leads to fundamental internal contradiction. Ironically, the attempt to clearly demarcate between Piracy and Privateering was historically governed by *extra-judicial* forces; the abolition of Privateering and the subsequent universal criminalisation of Piracy were both ultimately dependent upon States de-legitimizing privatised armed forces. 'Privateering generated organized Piracy. Mercenaries threatened to drag their home states into other state's wars. Mercantile companies turned their guns on each other and even on their home states. The result was probably the closest

285 Grotius' reasoning is unclear here, as there is no compelling explanation offered as to how the privateering has occurred within the sovereign jurisdiction of the Indigenous Principalities.

286 Interestingly, considerations of geo-spatiality are not offered in the case of the Portuguese, whose unacceptability as judges is premised upon bias and moral opprobrium alone.

287 Ibid. 274–5. Emphasis added.

the modern system has ever come to experiencing real anarchy.²⁸⁸ At the same time, the universal de-legitimation of privatised armies was economically viable only *after* the States had found alternative ways of generating for themselves an adequately profitable rate of 'protection rent'; 'Tribute-paying empires yielded diminishing returns as they drew more manpower into the maintenance and extension of such conquests. The protection rents stimulated oceanic commerce and industries which found new markets from wider trade. In... the period of the expansion of Europe, those fields of enterprise yielded increasing return.'²⁸⁹ As we should expect, irregularities of legal taxonomy parallel vicissitudes of State praxis within the Modern World-System.

Technically, pirates were clearly distinguishable from privateers. Privateers possessed a state's authority to commit violence. They targeted only the enemies of the authorizing state... [Yet] at the end of every war, large numbers of privateers turned pirates only to be granted new privateering commissions on the outbreak of the next war. So long as states insisted to exploit individual violence, piracy could not even be defined, much less suppressed.²⁹⁰

As I will now show, the logical implications of this most dangerous of supplements had to be played out within the zone of the colonial difference itself.

288 Thomson, *Mercenaries, Pirates, and Sovereigns*, 43.

289 Lane, *Profits from Power*, 36.

290 Thomson, *Mercenaries, Pirates and Sovereigns*, 140.

Chapter Eight

'Concerning the Indians': *Ius Naturale*, Infidels, and Natives

The discovery of America, and that of a passage to the East Indies by the Cape of Good Hope are the two greatest and most important events in the history of mankind. Their consequences have already been very great; but, in the short period of between two and three centuries which has elapsed since these discoveries were made, it is impossible that the whole extent of their consequences can have been seen. What benefits, or what misfortunes to mankind may hereafter result from those two great events, no human wisdom can foresee.

(Adam Smith)

Although Keene has conclusively established the presence of the colonial difference as the dangerous supplement to the Grotian Heritage, his lack of a broader historical understanding of Colonialism leads him to omit detailed consideration of the subtly nuanced treatment of the peripheral zone within the Grotian corpus.¹ It comes as surprise then, that, *prima facie*, *De Indis* is an *anti-colonialist* Text. Holland's Other, 'barbaric' Portugal, is narratively re-constituted throughout the Text as the sole signifier of unjust aggression, bringing death and injustice to the Indies. The Portuguese's 'shameless lust for property was wont to take cover under the excuse of introducing civilization into barbaric regions.'²

I prefer to have the reader draw information from the writings of the Spaniards, rather than from my own words, regarding the instances of unparalleled treachery, the mangling of women and children belonging to the households of native potentates, the disturbances of [East Indian] kingdoms through the poisonous activities of the Portuguese and the abominable cruelty displayed toward both subject and allied peoples... Certainly a great many writers are of the opinion that a comparison of Spanish conduct in America and Portuguese conduct among the East Indians will show the Spaniards to be much more notable for violence and the Portuguese for perfidy; that is to say, the lat-

- 1 Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002).
- 2 Hugo Grotius, [*De Indis*] *De Iure Pradae Commentarius. Commentary on the Law of Prize and Booty*, trans. Gwladys L. Williams and Walter H. Zeydel (London: Wildy & Sons: London, 1964), 222.

ter are no less malicious than the former, but the Spaniards are endowed with greater courage and strength.³

The conspicuous absence of the 'East Indian' as an object of opprobrium has even led some scholars to doubt the relevance of Critical Theory to an interpretation of the Grotian corpus. According to Roelofsen, the view of Grotius

as a protagonist of European colonialism [is] somewhat beside the mark, since Grotius did not develop a theory of colonialism... [In the early 17th century] Western European colonialism was only in its initial mercantile stage. Grotius could still quite plausibly argue that a monopoly of trade such as was being established by the Dutch East India Company was not unknown in European practice and was not—as we with the wisdom of hindsight consider it to have been—the first step towards economic and political subjugation.⁴

Apart from the question concerning how many early international legal scholars could be accurately said to have possessed an actual 'theory' of colonialism,⁵ the issue of Grotius' relationship to Indigenous dispossession may be clarified when *De Indis* is read not through the prism of authorial intention but through the

3 Ibid. 181–2. Presumably this tribute paid to Spanish machismo is an ingratiating gesture directed to the Castilian negotiators of the Truce.

4 C.G. Roelofsen, 'Grotius and the "Grotian Heritage" in International Law and International Relations; the Quatercentary and its Aftermath (circa 1980–1990)', *Grotiana*, NS 11 (1990), 6–28 at 14.

5 Presumably Roelofsen is thinking of Locke, who, like Grotius, was immersed in the Late Scholastic tradition. See Karl Olivecrona, 'Appropriation in the State of Nature: Locke on the Origin of Property', *Journal of the History of Ideas*, 35/2 (1974), 211–30, *passim*; Barbara Arneil, 'John Locke, Natural Law and Colonialism', *History of Political Thought*, 13/4 (1992), 587–603 at 45–61; Robert A. Williams, 'Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law', *Arizona Law Review*, 31 (1989), 237–78 at 250–3. It is useful to situate Locke's theory of property value within terms of World-Systems Analysis. The Lockean doctrine of appropriation adds to

the correctness of reading him as a great philosopher of the developing world system which linked the old world with the new with ties of domination and subordination. Clearly, by both the prime measure—that of human energy expended to modify nature—and, for Locke, the necessary correlative—that of the maximization of production—most Native Americans failed to meet the principal qualifications for owning a part of America.

Herman Leboric, 'The Uses of America in Locke's Second Treatise of Government', *Journal of the History of Ideas*, 47/4 (1986), 567–81 at 578. See Eric R. Wolf, *Europe and the Peoples without History* (Berkeley: University of California Press, 1997), 158–94; James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 137–76; D.P. O'Connell, 'Territorial Claims in the Grotian Period', in C.H. Alexandrowicz (ed.), *Grotian Society Papers, 1968: Studies in the History of the Law of Nations* (The Hague: Martinus Nijhoff, 1970), 1–15, *passim*.

lenses of Post-Structuralism. It may be useful to insert a Derridean 'pun' of my own at precisely this juncture to serve as a critical counterpoint to Roelofsen. In Latin, 'Author' is *auctoritas*; it serves simultaneously as the root for both 'Author' and 'Authority'. Etymologically, every Author is an 'Author-ity', the writer infusing his or her Text with a meaning(s) that is (are) guaranteed by his or her 'presence'. Whenever Grotius writes he is re-constituted as an authority—in our case, the affairs concerning the East Indies. As he writes, Grotius-as-Author-ity imposes his presence upon the Text and validates 'meaning'; *who* the Author-ity actually is, therefore, becomes a vital question not only for hermeneutical reconstruction of originary meaning (if any), but equally so for political de-notation. Grotius, a temporally constituted juridical Author-ity within Braudel's 'event' Time, can never be presumed to be 'innocent' when writing/speaking about the 'Indies/Indians'. A seventeenth-century Dutch jurist, chief apologist for the VOC, and personal confidant of the *de facto* ruler of the Dutch Republic is obviously not just 'anyone', but a clearly delineable Author-ity who is imbricated within the colonial difference that was the East Indies.⁶ The lurking presence of the colonial difference within the 'event' of the writing of *De Indis* compels the Reader to adopt an interminable suspicion towards Grotius' discourse about the Indians. 'Coloniality of power and historico-structural dependency: both imply the hegemony of eurocentrism as epistemological perspective... In the context of [the] coloniality of power, the dominated population, in their new, assigned identities, were also subject to the Eurocentric hegemony as a way of knowing.'⁷ As I shall demonstrate, Grotius' taking up of the problem 'Concerning the Indians' clearly implicates him in what Mignolo has de-noted as the 'darker side of the Renaissance': the foundational act when Modernity 'occluded the pluriversal under the persuasive discourse of the universal.'⁸ Employing the logic of the dangerous supplement, I will argue that the Text may be readily perceived as being suffused by the 'Presence' of Colonialism.⁹ *De Indis* may be legitimately classified as a 'proto-colonialist Text' in at least

6 For discussion of the colonial difference, see above, Chapter Two.

7 Annibal Quijano, cited in Walter D. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2000), 54.

8 Walter D. Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, & Colonization*, 2nd edn (Ann Arbor: the University of Michigan Press, 2003), 435. For an extensive discussion of such an occlusion in Vitoria and primitive legal scholarship, see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 13–31. 'It is precisely whatever denotes the Indian to be different—his customs, practices, rituals—which justify the disciplinary measures of war, which is directed towards effacing Indian identity and replacing it with the universal [particular?] identity of the Spanish.' Ibid. 29.

9 Considerations of Theory are neatly complemented by incidents of Fact. In his testimony before the Dutch admiralty Board, van Heemskerck called for the creation of a primitive Trusteeship system for the Indian subsystem:

Since God has blessed us in the East Indian navigation beyond measure and allowed us to make friends with so many different nations and kings in such a short time, we

two senses: (i) *the discursive*, the Text implicitly resting upon the supplement of the expropriating logic of other more explicitly colonialist Texts such as Vitoria's *De Indis*; and (ii) *the temporal*, the Text operating within the arche-trace of the structural history of the incorporation of the Indian Ocean world system. The discursive precariousness of the proto-colonialist sub-Text—so precarious that Roelofsen declares himself unable to find one—is paralleled by the historical 'fragility' of the Dutch penetration of the Indian Ocean sub-system at the moment of composition;¹⁰ as Roelofsen correctly implies, *De Indis* inhabits the space of a unique phase of Dutch hegemonic transition.

I Vitoria and the Pirates: The Portuguese as Pirates/infidels

In a striking transposition, Grotius radically inverts the conventional relationship between Indian/Other and European/Self through a remarkable rhetorical stratagem: the invocation of the 'Black Legend', the partially apocryphal reign of terror inflicted upon the Low Countries during the early phase of the Dutch Revolt by the Spanish commandant Ferdinand Alvarez de Toledo, the Duke of Alba (1507–1582).¹¹ Van Ittersum clearly grasps the significance of this stratagem; 'the Spanish Black Legend was in many ways a Dutch cultural artefact.' As Van Ittersum convincingly demonstrates, 'it was Grotius who realized the full implications of the Spanish Black Legend for the Dutch War of Independence. It neatly justified Dutch overseas expansion as one more military front in the struggle against the Habsburg pretensions to universal monarchy.'¹² Even more importantly, Grotius' tactical re-deployment of the Black Legend within an 'Orientalist' setting produces a sub-Textual conflation between Self and Other. In a singular move,

ought to seize every opportunity and do our very best, in word and deed, to settle our nation in the East Indies and establish a body politic, in the hope that it may grow and flourish, God willing.

Cited in Martine Julia van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in *De Jure Praedae* (1604–1606)', *Asian Journal of the Social Sciences*, 31/3 (2003), 511–48 at 534.

- 10 See C.H. Boxer, *The Portuguese Seaborne Empire 1415–1825* (Harmondsworth: Penguin Books, 1969), 57, for the *Estado* as an 'inherently brittle structure'. Wallerstein has repeatedly drawn attention to the operational effectiveness of European colonialism being limited to naval superiority. With the exception of Latin America, large-scale territorialism was not undertaken until the development of industrialized armies in the 19th century. Immanuel Wallerstein, *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974), 330.
- 11 For general discussion, see K.W. Swart, 'The Black Legend During the Eighty Years War', in J.S. Bromley and E.H. Kossman (eds), *Britain and the Netherlands Volume V: Some Political Mythologies* (The Hague: Martinus Nijhoff, 1975), 37–57, *passim*.
- 12 Martine Julia van Ittersum, 'Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615', Ph.D. thesis (Harvard University, 2002), 57.

one group of Europeans are actively—and *positively*—identified with Indians and both are ontologically validated as the righteous 'avengers' of prior breaches of *ius naturale* shared in common at the hands of a single perpetrator—the Iberians. The relationship here is not merely binary but tripartite. In the first of several such sets of 'doublings,' Grotius establishes a discursive arc linking the 'East' Indians with the inappropriately de-noted 'West' Indians, the utterly hapless victims of the first Black Legend; both 'sets' of Indians are, therefore, identical to the Batavians. The textual lynchpin of this variegated set of re-presentations was the *Brevisima Relacion* (*A Short Account of the Destruction of the Indies*) by the Dominican mendicant Bartolome de Las Casas (1484–1576). Not only did Las Casas' graphic account of Spanish genocide in the Caribbean dominate sixteenth-century discussion of the situation 'Concerning the Indians,' it had a potent effect upon the early development of Dutch Republicanism; in the view of Dutch nationalists, Iberia intended to subject the Low Countries to the same colonial 'treatment' previously meted out to the West Indians.¹³ Grotius unambiguously establishes this point in the *Historica*.

The inhabitants [of Amboyna] were subjugated to the same savage treatment that the people of the Low Countries had often suffered at the hands of the Spaniards. Slaughter was practised without distinction of age or sex; little children and women were slain indiscriminately. Nor were they merely slain; for some of the Portuguese cut off the limbs of young children before the very eyes of their parents, and others searched with their swords both the wombs of pregnant women and babies that were unquestionably innocent.¹⁴

The imminent prospect of Holland, a sovereignty lying well within the Euro-centric lines of amity, being illicitly transformed into yet one more geo-spatial site of the colonial difference yielded only one result; as our discussion of Fanon in Chapter Two has shown, colonial violence ends in unconditional resistance.

The express reliance upon *ius naturale* effectively suspends any difference between the Dutchman and the Indian, reconstructing them both as Self. From a contemporary perspective, this could be plausibly construed as constituting a positive or progressive moment in the legal literature of late Renaissance Europe on par with the work of Las Casas. Yet, as Mignolo reminds us

The 'Black Legend' functioned as a double-edged sword. On the one hand, it was a political justification for England and France [and Holland] to undermine Spanish power by accusing Spain of brutalizing the Indians. On the other hand, it was useful to under-

13 Ibid. 69–77. Van Ittersum convincingly shows that the Dutch Republican 'notion of Spanish tyranny remained quite consistent and owed much to the *Brevisima Relacion*, the harrowing description of Spanish conquest and colonization.' Ibid. 105. There were no fewer than twenty-five Dutch editions of Las Casas' work published during The Eighty Years War.

14 Grotius, *De Indis*, 292.

write the Christian universal that had been recounted by Spanish missionaries after the 'discovery of America'.¹⁵

Grotius' rhetorical engagement with the 'liberation' of the Indians only makes sense within the intra-European context of the successful resolution of the problem of hegemonic succession between Iberia and the nascent commercial republic of the United Provinces. Insofar as the Indians, either 'West' or 'East', possess any positive meaning, they do so solely through their incorporation into the meta-narrative framework of the new Euro-centric Universalist History.

[A] new type of universal history began to be written [in the 16th century] in which America and its people were definitely located in the infancy of the world and of human history. The 'Black Legend', in summary, displaced the locus of enunciation from southern Christian/Catholic Europe to northern/Calvinist and Protestant Europe... it served to establish the imperial difference between the northern and southern countries of Europe.¹⁶

Armed with this newly minted 'imperial difference', Grotius is finally in a position to implement his single most audacious metaphysical inversion, the secret 'Presence' haunting these nearly unintelligible passages: it is not the Dutch but the *Portuguese* who must be legally (re-) classified as Pirates, through *their* ultra vires enforcement of illegitimate Hispanic *imperium*.

The Portuguese, though they assume the guise of merchants, are not very different from pirates. *For if the name of 'pirate' is appropriately bestowed upon men who blockade the seas and impede the progress of international commerce,*¹⁷ shall we not include under the same head those persons who forcibly bar all European nations (even nations who have that have given them no cause for war) from the ocean and from access to India, although they are not able to find among the exceedingly diverse and mutually contradictory pretexts that they adduce in defence of their savage behaviour, so much as one excuse that can be rendered acceptable to their own relatively fair-minded compatriots? Therefore, since it was invariably held in ancient times that persons of this kind were worthy objects of universal hatred in that they were harmful to all mankind, and since

15 Mignolo, *The Darker Side of the Renaissance*, 430-1.

16 Ibid. 431.

17 Note how this definition expressly relies upon a strictly Naturalist understanding of *mare liberum* and *liberum commercium*. For this very reason, the majority of States refused Grotian Naturalism, relying instead upon a proto-Positivist concept of Humanist *mare clausum*. Alfred P. Rubin, 'The Use of Piracy in Malayan Waters', in C.H. Alexandrowicz (ed.), *Grotian Society Papers 1968. Studies in the History of the Law of Nations* (The Hague: Martinus Nijhoff, 1975), 111-35 at 114. According to Rubin, this passage marks the first time that the term 'Piracy' was applied to maritime conduct in South East Asia. Ibid. 118.

even now there is no one, or at the most perhaps a few individuals,¹⁸ who would absolve the Portuguese from the charge of belonging to this class, why should anyone fear that he might incur ill will by inflicting punishment upon them? Thus we conclude that it cannot be dishonourable for [Dutch] merchants to take well-deserved vengeance upon the violators of a public right, with the purpose of ensuring greater security for themselves in the enjoyment of that right, just as there can be no one who will censure the conduct of a traveller assaulted in the course of his journey by a highwayman, if that traveller bravely and quite justifiably takes his assailant captive. Nor is the mercantile manner of life incompatible with such vengeance.¹⁹

A crucial rhetorical move is made early on in the *Prolegomena*, when the Text identifies resistance to the World-Economy as barbarism.

In every part of the world we find a division into... [socially] united groups, with the result that persons who hold themselves aloof from this established practice seem hardly worthy to be called human beings. Thus one might almost say that the ultimate infamy is the condition described in the words... 'a lawless man, without tribe or hearth.'²⁰

The analogy between the Portuguese and Pirate, discursively established through Iberian resistance to *liberum commercium/mare liberum*, yields a second similitude between the Portuguese and the 'un-Christian,' or 'Infidel.'

The spirit of any nation has a quality common to all its people. In that sense, to be sure, individual actions form a basis for conjectural inference... Writers of ancient times tell us that even long ago the Portuguese people were accustomed to live by robbery and plundering; and persons of the better class among the Portuguese themselves are by no means unaware of the vileness and avarice of the blood that has intermingled with their race since those bygone times, nor have they failed to note the vast number of Portuguese who are not seriously regarded among Christians as Christians.²¹

The denial of the Christian identity of the Portuguese yields a binary set of discursive antinomies: Portuguese/Pirate and Portuguese/Infidel. This, in turn, brings *De Indis* into the operational scope of the Late Scholasticism of Vitoria;²² the Nat-

18 The Pope?

19 Grotius, *De Indis*, 327; see *ibid.* 270–3. Emphasis added.

20 *Ibid.* 20. See above, Chapter Three.

21 *Ibid.* 227–8.

22 J.A. Fernandez-Santamaria, *The State, War and Peace: Spanish Political Thought in the Renaissance 1516–1559* (Cambridge: Cambridge University Press, 1995), 58–96; Anthony Pagden, 'Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate Over the Property Rights of the American Indians,' in *id.* (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987), 79–98, *passim*; Anthony Pagden, *Spanish Imperialism and the Political Imagination: Studies in European and Spanish-American Social and*

uralist basis of Thomistic *bellum iustum* is premised upon the ‘anti-natural’ depredations of non-Christian or ‘Infidel’ peoples: ‘The cause of just war is to redress and avenge an offence...If the barbarians deny the Spaniards what is theirs by the law of nations, they commit an offence against them. Hence, if war is necessary to obtain their right (*ius suum*), they may lawfully go to war.’²³ Again, the shift to the ‘dominant’ pole of Late Scholasticism proves indispensable. The non-Christian peoples are not devoid of *ius*—unlike with Civic Humanism—but are lawfully subject to punitive action, or retorsion, in the event of a breach of Natural Law.²⁴ *Liberum commercium* and *mare liberum* are *ius naturale*, the violation of which produces an *inuria* that yields *bellum iustum* as reparation.

The first proof comes from the law of nations (*ius gentium*), which either is or derived from natural law... What natural reason has established among all nations is called the law of nations. Among all nations it is considered inhuman to treat strangers and travellers badly without some special cause, humane and dutiful to behave hospitably to strangers.²⁵... [Thus] if the Spaniards were not allowed to travel amongst [the Indians], this would be by natural, divine, or human law. But they are certainly allowed to do so by divine and natural law. But if there were a human enactment (*lex*) which barred them without any foundation in divine or natural law, it would be inhumane and unreasonable, and therefore without the force of law.²⁶

Illicit maritime depredation within the World-Economy legitimates the dual classification of the Portuguese as both ‘Pirate’ and ‘Infidel’; in an astonishing reversal of discursive tropes, the Grotian Text, following neo-Thomist Naturalism, is able to deprive the Portuguese of their Self/European status.

If the barbarians [Portuguese/Pirates]... persist in their wickedness and strive to destroy the Spaniards, [the Spanish] may treat [the Indians/Portuguese/Infidels] no longer as

Political Theory 1513–1830 (New Haven: Yale University Press, 1998), 13–36; Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990), 93–108.

- 23 Francisco de Vitoria, ‘On the American Indians’, in id., *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 231–92 at 282.
- 24 James Muldoon, *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century* (Philadelphia: University of Pennsylvania Press, 1988), 16–20; James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World 1250–1550* (Philadelphia: University of Pennsylvania Press, 1979), 6–27.
- 25 See Q.1 Art. 2 in Francisco de Vitoria, ‘On Civil Power’, in id., *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 1–44 at 7 for the Scholastic doctrine of *societas*. ‘In order to make up for... natural deficiencies, mankind was obliged to give up the solitary nomadic life of animals, and to live in partnership (*societas*), each supporting the other.’
- 26 Vitoria, ‘On the American Indians’, 278–9. See 278–84, *passim*.

innocent enemies, but as treacherous foes against whom all rights of war can be exercised, including plunder, enslavement, deposition of their former masters, and the institution of new ones. All this must be done with moderation, in proportion to the actual offence. The conclusion is evident enough: if it is lawful to declare war on [the barbarians/Portuguese/Pirates/Infidels], then it is lawful to exercise the full rights of war.²⁷

To summarise: *imperium*, even in its most reified form an implicit aid to Rome/Portugal, threatens to undermine the re-configuration laboured by *De Indis* governing the iterable relationship between *res communitalis* and *proprietas*, the discursive lynchpin negating the legitimacy of the Treaty of Tordesillas and the correspondent affirmation of Corporate Sovereignty and *mare liberum*. The heavy discursive price that Grotius must pay in order to guarantee the legitimacy of VOC privateering and the seizure of the *Santa Catarina* is the almost infinite divisibility of public authority. The critical rhetorical manoeuvre, which guarantees the lawful global governance of the Indian Ocean world system, is the legitimisation of Corporate Sovereignty through the discursive shift towards Late Scholasticism, Vitoria providing the key set of signifiers symbolically validating *mare liberum/liberum commercium*. The attempt by the Text to suppress the 'play' of *differance* has led to the precipice of doctrinal and rhetorical incoherence, the unintelligible conflation of 'Apology' with 'Utopia'. Finally, the lurking presence of *iurisdictio et protectio*—the problematic heritage of Gentili's Civic Humanism notwithstanding—places Grotius unconditionally within the normative holistic framework of Primitive Legal Scholarship.

Paradoxically, *De Indis*, through the internal logic of its own discursive formation, is placed in the remarkable position of advocating an 'alliance' between Christians (Dutch/Protestant) and Muslims/East Indians against a rival faction of Christians (Iberian/Catholic) solely on the basis of the latter's breach of the *ius naturale*.²⁸ In what is arguably the single most remarkable passage in *De Indis*, Grotius manages to achieve a tone that is frighteningly Conradian.

After the Dutch had made their appearance among the East Indians, the worth of the newcomers was carefully weighed in the Indies, as is customary in regard to merchants. Our countrymen were commended for their good faith and industry, as well as for the fact that they had traversed so vast an expanse of sea for the sake of commerce. Nevertheless, the extraordinary renown of the Spaniards remained pre-eminent, for they were believed to be the conquerors of almost every region of the earth, and the only mortals who had never been vanquished. It is true that the East Indians hated the Portuguese; but at the same time they regarded that people with fear and even with veneration, just as evil genii... are worshipped by the barbarous nations for the sole purpose of averting the injuries that might be inflicted by those evil spirits. The prestige enjoyed

27 Ibid. 283.

28 European 'treating' with Muslim principalities was always inherently ambiguous; the irony here is that the archetypal Infidel within medieval jurisprudence was none other than the Muslim. Muldoon, *The Americas in the Spanish World Order*, 15.

by the Portuguese and the fear inspired by them, enabled them to hold possession of the islands and shores over which they had not been able to establish true dominion.²⁹ Many persons did not even dare to set sail upon the sea without first purchasing Portuguese permission.³⁰ So it was that all other peoples were looked upon as inferior and as destined to yield quite speedily before the power of the Hispanic nations. But as soon as the Dutch had been provoked to display their valour, as soon as these men... met armed force with armed force, who among the East Indians was not struck with astonishment? Who among them did not marvel at the very existence of a nation which refrained from proving its strength until compelled to do so, although nothing was beyond its power? Everywhere the East Indians extolled the Hollanders as the most valiant of men, defenders of their allies and subduers of their enemies; and everywhere, too, they assigned to our people with prayers and steadfast hope, the role of saviours of the Orient. Thus the great and fearful fame of the Portuguese gave way before the Dutch, amid manifestations of affection for the latter, on the part of the peoples proclaiming this change of heart, as intense as the hatred built up by the Portuguese against themselves. Everyone wished to know what land nurtured men so brave and just, what government ordered their affairs. Every East Indian state vied with the others in dispatching embassies and gifts all the way to our own part of the world. Each state strove to ally itself with the Dutch. The East Indian kings themselves hastened to meet our sailors, as if the latter were princes.³¹ Exemption was granted us from the imposts and tithes paid by other nations. In short, no act was omitted that might serve as testimony to sentiments of goodwill and even of veneration.³²

The shades of Mr. Kurtz or Lord Jim notwithstanding, the doctrinal problem that Grotius had to face was how to best juridically 'frame' the problem of the 'Infidel Alliance' in the face of contending ontologies. His leading positivist authority, Gentili, ultimately proved unsuitable, due to the Protestant's exclusive occupation of the pole of Civic Humanism. For *Civitas*, the Infidel 'Other' necessarily lies outside of the juridical parameters of *societas gentium*, a discursive necessity inherently incompatible with the heteronomous political logic of the Indian Ocean world system. For Civic Humanism, the non-Christian, like the Pirate, is taxonomically re-constituted as *hostis humani generis* who objectively falls outside of the protective bounds of consideration *pacta sunt servanda*. Following Cicero,³³ Gentili, somewhat predictably, utilises the rhetorical equivalence be-

29 *Occupatio duplex*.

30 The *cartazes* system. See above, Chapter Three.

31 A rhetorical flourish that acquires a more sinister political *double-entendre* when considered within the institutional 'trace' of the textual production of *De Indis*.

32 Grotius, *De Indis*, 333–4.

33 The relevant passage appears to be in Book III of *De Officiis*.

There must be laws of warfare, and it often happens that faith given to an enemy must be kept. For if an oath has been sworn in such a way that the mind grasps that this ought to be done, it should be kept; if not, then there is no perjury if the thing is not done. For example, if an agreement is made with pirates in return for your life, and you

tween the Infidel with the Pirate—signified by the same sets of breaches *ius naturale*—as evidence of non-participation, and, therefore, of *non-recognition*, within international public order.

Either a Christian joins arms with an infidel against another infidel or against a Christian. Against infidels the Maccabees did this and the Kings of Judah, and in modern times the Portuguese. And such an alliance does not seem to me to be lawful... Therefore it is lawful neither to lend aid to infidels nor to accept aid from them against other infidels. And if it is not lawful to do this against infidels, how much less will it be allowed to do it against the faithful?... It is never right to make an alliance with infidels, although peace may be made and kept with them. *It is characteristic of infidel barbarians to burn, pillage and destroy. It is their way to use unfair rules, to fight with poison, to wage a merciless war, at any rate to inflict slavery, which has been abolished in al Christian warfare...* Moreover, you cannot trust infidels. For although the impious oath of an infidel may be accepted, yet what trust can be put in an unbeliever?³⁴

It is now clear why Grotian discourse is logically compelled to resist this Humanist manoeuvre; the signature 'micro-oscillation' between Civic Humanism to Late Scholasticism effectively pre-empts the Grotian Text from excluding *a priori* non-European 'Others' from the juridical ambit of the comparatively 'thick' variant of *ius naturale*. Accordingly, Grotius once again establishes a derivative position vis-vis Vitoria. Pro-Vitoria but contra-Gentili, Grotius asserts

Do we perhaps believe that we have nothing in common with persons who have not accepted the Christian faith? Such a belief would be very far removed from the pious doctrine of Augustine, who declares (in his interpretation of the precept of Our Lord whereby we are bidden to love our neighbour) that the term 'neighbour' obviously includes every human being... Accordingly, not only is it universally admitted that the

do not pay the price, there is no deceit, not even if you swore to do so and did not. For a pirate is not counted as an enemy proper, but is the common foe of all. There ought to be no faith with him, nor the sharing of any sworn oaths.

Cicero, *On Duties*, ed. M.T. Griffin and E.M. Atkins (Cambridge: Cambridge University Press, 1991), 141.

- 34 Alberico Gentili, *De Iure Belli Libri Tres*, Introduction by Coleman Phillipson (New York: Oceana Publications, 1964), 401–2. For Gentili's reliance upon *Civitas* in the face of cultural difference—in contrast with Grotius' universalising strategy of *ius naturale*—See Benedict Kingsbury, 'Gentili, Grotius, and the Extra-European World,' in Harry Scheiber (ed.), *Law of the Sea: The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff, 2001), 39–60, *passim*.

Gentili's approach was to combine a pragmatic pluralistic understanding of international society with normative judgement based on the narrower world-view constituted by his own moral, religious and political commitments... Grotius goes beyond Gentili in his attempt to construct a philosophically robust system of natural law that he believes might be truly universal.

Ibid. 42.

protection of infidels from injury (even from injury by Christians) is never unjust, but it is furthermore maintained, by authorities who have examined this particular point³⁵ that alliances and treaties with infidels may in many cases be justly contracted for the purpose of defending one's own rights too... In any case, it is certain that the cause of the King of Johore was exceedingly just. For what could be more inequitable than a prohibition imposed by a mercantile people upon a free King to prevent him from carrying on trade with another people? And what would constitute interference both with the law of nations and with the distinct jurisdictions of different princes, if such a prohibition does not?³⁶

Virtually the entirety of *De Indis* formal treatment of the legal status of the East Indians as the juridical counterparts to the Europeans is drawn from Vitoria, who is repeatedly cited as the foremost authority.

Even discovery imparts no legal right [to the Portuguese] in the case of those things which were ownerless prior to the act of discovery. But at the time when the Portuguese first came to the East Indies, the natives of that region—though they were in part idolaters, in part Mohammedans, and sunk in grievous sin—nevertheless, enjoyed public and private ownership of their property and possessions, an attribute which could not be taken from them without just cause. This is the conclusion expounded by the Spaniard Vitoria with irrefutable logic and in agreement with other authorities of the greater renown³⁷... For the factor of religious faith, as Saint Thomas rightly observes, does not cancel the natural or human law from which ownership has derived. On the contrary, it is heretical to hold that infidels are not the owners of the property that belongs to them. And the act of snatching from them, on the sole ground of their lack of faith, those goods which have been taken into their possession, is an act of thievery and rapine *no less than it would be if perpetrated against Christians. Thus Vitoria correctly maintains that the Spaniards acquired no greater right over the American Indians in consequence of that defect of faith, than the Indians would have possessed over the Spaniards if any of the former had been the first foreigners to come to Spain.*³⁸

It is at precisely this juncture that *De Indis* is most imperilled by the self-subverting logic of the dangerous supplement; both the Text as well as its own external discursive sources runs the risk of incoherence. First of all, it is important to note that Vitoria, despite his appropriation by numerous contemporary Indigenous Law scholars as an advocate of equitable treatment of Native Peoples, is not, in fact, 'pro-Aboriginal'. As discussed in Chapter Three, Vitoria, by virtue of being a neo-Thomist, is necessarily anti-Hieratic, and his attitude towards the Indigenous States must be understood strictly within the terms of his views regarding

35 Vitoria.

36 Grotius, *De Indis*, 315.

37 Vitoria, 'On the American Indians', 231–51.

38 Grotius, *De Indis*, 221–2. Emphasis added.

core zone politics of papal monarchy.³⁹ Vitoria's true utility for Grotius lies within the 'happy coincidence' of opposition to Aboriginal dispossession as a logical corollary to doctrinal anti-Papalism; for both Vitoria and Grotius, the Treaty of Tordesillas constituted an ultra vires extension of Papal *dominium* to the New World. In 2.2 of Vitoria's *De Indis*, 'Second title, that the just possession of these countries is on behalf of the supreme pontiff,' we read

*The Pope has temporal power only in so far as it concerns spiritual matters; that is, as far as it is necessary for the administration of spiritual things. This is the opinion of Torquemada... and of all the doctors. The proof is that the art whose purpose is higher governs and instructs those arts whose purposes are lower... The purpose of the spiritual power is ultimate happiness, because whereas the purpose of civil power is social happiness; therefore temporal or political power is subordinate to spiritual power... [Hence] the pope has no temporal power over these barbarians, or any other unbelievers... if the Pope has no temporal power except in relation to spiritual matters, and if 1 Cor. 5:12 shows that he has no spiritual power over the barbarians, it follows that he can have no temporal power over them either.*⁴⁰

Anticipating Grotius by almost a century, Vitoria seeks to advance the core-state interests of his own principality—Spain—at the expense of the decaying Hieratic jurisprudence of Rome. Unlike Holland, however, Spain as a core-state is situated within the early Capitalist World-Economy in a far less advantageous position; as a territorialist State, the Treaty of Tordesillas suited the short-term interests of the (long-term) debilitating policy of proprietary investiture.

II Grotius and Indigenous Dispossession: Apologia and Utopia

One of the most striking realisations experienced when reading Grotius is that the 'Indians' themselves are almost wholly *absent* from a Text that is ostensibly 'about them.' As I have already shown, *De Indis* assumes a thoroughly Euro-centric and Universalist approach in its primary discursive objective of resolving an international legal dispute among the Papacy, Portugal and the United Provinces. Even the title of the treatise obviates the Aboriginal Presence, by referring to 'the Indies' as a territorial space subject to core state competition (and, ultimately, appropriation and exploitation), rather than to 'the Indians' as a non-European People/Other invested with Being. Although methodically anti-Portuguese, Grotius wholly fails in achieving discursive symmetry by refusing to re-present the Indigenous victims as a counter-balancing signifier of a rival but positive meta-physical Presence. This is signified by Grotius' open endorsement of the Aristotelian construct of 'natural slavery'; when Aristotle 'says that certain persons are by virtue slaves, [he means this] not because God did not create man as a free being,

39 Fernandez-Santamaria, *The State, War and Peace*, 97–119.

40 Vitoria, 'On the American Indians,' 261–3.

but because there are some individuals whose character is such that it is expedient for them to be governed by another's sovereign will rather than their own.⁴¹

The fundamental legal problem that Grotius has to confront is the determination of the legitimacy of treaties between European sovereign States and Indigenous Peoples, either in the form of 'public' alliances or 'private' trade concessions.⁴² Here, the legal distinction between public/private may refer either to the subject matter of the agreement—War versus Trade—or the legal identity of one or more of the 'contracting' parties. As a treaty is only lawful—and, therefore, enforceable—between two or more Sovereigns, the legal status of any kind of agreement entered into by either the United Provinces or the VOC with the 'Indians' is ultimately dependent upon the Native 'principalities' meeting the formal requirements of original personality. This, in turn, depends upon the successful resolution of two ancillary problems: are non-Christian peoples as a universal category invested (even if only potentially) with sovereignty, and, if they are, how could such sovereigns be legally incorporated into the VOC-dominated World-Economy?

The discursive vicissitudes of *De Indis* closely parallel the alterations in the Company's own trade policies—and not, significantly, those of the United Provinces. For as long as the VOC maintained an orthodox hegemonic role of trade/market penetration, Indigenous Sovereignty could be comfortably maintained, Native Peoples merely becoming 'marginalised' within the World-Economy. Following the Orangist coup d'état of 1618 and the intrastate political supremacy of Gomarist factionalism, however, both the Dutch State and the Company, in strict unison, moved towards territorialisation. From this point onwards, the 'Indians' had to be forcibly juridically dispossessed of their sovereignty—and, by extension, of their derivative property rights—so as to facilitate their eventual violent incorporation into the World-System.

Complicating Grotius' task was the latent incommensurability of the rival paradigms of International Law governing his discursive production regarding the 'Indigenous Problem', the Late Scholastic and the Civic Humanist. Neo-Thomism openly expounded the residual lawful sovereignty of non-Christian (i.e., 'Infidel') peoples, and upheld the *prima facie* legitimacy of any treaty entered into with them by a European sovereign. Civic Humanism, consistent with its relative shift away from Thomistic Natural Law towards Aristotelianism, denied the sovereignty of Aboriginal principalities, and considered as inherently null and

41 Grotius, *De Indis*, 62. A decidedly 'Humanist turn'. Compare Grotius with Gentili on this point: 'Aristotle says that the barbarians are created by nature to be slaves; that therefore war against them is just and like hunting wild animals; for hunting is a kind of warfare.' Gentili, *De Iure Belli Libri Tres*, 54. For further discussion of 'natural slavery', see below, this chapter.

42 For Anghie, the question of Sovereignty is the central one for the earliest development of International Law, a juridical discourse historically inseparable from the first encounters with Native Peoples. Angie, *Imperialism, Sovereignty and the Making of International Law*, 13–31.

void any treaty or contractual relationship between European and non-European. Both positions, in turn, were largely governed by their respective competing approaches to property rights, neo-Thomism postulating universal *communis* and Civic Humanism asserting acquisitive *occupatio*. Here Grotius faces the same dilemma of rhetorically demarcating *iurisdictio* from *proprietas*; 'it is not at all clear that Grotius' distinction between jurisdiction and property was a satisfactory one, and if it were to fail, then either a more ruthless colonialism or no colonialism at all would be the consequence.'⁴³

III Territorialism and the Logic of Monopoly: Mercantile-Capitalism as Discourse

The discursive ambiguity of the status of Indigenous Peoples was textually enconced within the inherently contradictory logic of Holland's position within the Capitalist World-Economy. The fundamental dilemma for the United Provinces was that, over time, nascent hegemony must inevitably lead towards incremental territorialism.⁴⁴ Boogman has described the situation well.

There were fundamental contradictions in the field of foreign policy. Once Holland had won commercial hegemony, the Estates of the province strove as far as possible to maintain the status quo. Peace and quiet and commerce had become the watchwords of Holland's policy. All this implied respect for international law (*pacta sunt servanda*) as well. The pacifism of the Hollanders, not idealistic but utilitarian, went hand in hand with, in theory at least, a policy of abstention and non-commitment and a tendency to isolationism. This was also due to a certain apprehensiveness about falling victim to the aspirations and machinations of vainglorious, bellicose and expansionist potentates. The political elite of Holland showed an utter distaste for territorial expansion; indeed, there are occasional signs within that circle of a certain tendency towards territorial contraction. In contrast with the maritime commercial Holland tradition, the princes of Orange, who in case of conflicts used to be backed by the insignificant land provinces, the orthodox Calvinists and the, partly foreign, officers of the hired army, were more representative of the current monarchical-continental element: especially in the pe-

43 Richard Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 108. Discussing Grotius' submissions to the Anglo-Dutch Colonial Conferences, Van Ittersum, in a revealing moment, declares that Grotius' 'thinking on natural law and natural rights was an *unstable mixture* at best even as late as 1615.' Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595–1615* (Leiden: Brill, 2006), 389, emphasis added. That is precisely the point. For Grotius' pedantic escapades at the Conference, see *ibid.* 371–99.

44 See above, Chapter Three.

riod 1625–1650 they aspired to a monarchical position and strove for territorial expansion.⁴⁵

Although Boogman frames the debate over territorialism in terms of domestic constitutional tensions,⁴⁶ this entrenched policy struggle becomes even more intelligible once understood in terms of the economic logic of monopolisation; as World-Systems Analysis clearly demonstrates, a capitalist economy can never be an entirely ‘free.’

Not only is the capitalist system not properly described as a system of free enterprise today, there never was a moment in history when this was a reasonable descriptive label. The capitalist system is and always has been one of state interference with the ‘freedom’ of the market in the interests of some and against the interests of others.⁴⁷

Protectionism serves as a constant factor in the Capitalist World-Economy, periodically regulating the interstate relations between core and peripheral zones.

The ceaseless accumulation of capital precisely requires... a partially free market. This kind of market is the constructed result of the efforts on the one hand of some powerful economic actors to achieve relative monopolies by combining productive efficiencies and political influence and the contrary efforts of other actors to break or dilute these monopolies by combining alternative productive efficiencies and political influence. Monopolies are thus constantly being created and constantly being diluted. Nonetheless, at all points in time, some monopolies exist, and hence the world market has never been, or can it ever be more than, partially free. If it were otherwise, high profit rates could not exist, and in this case the ceaseless accumulation of capital would no longer be profitable.⁴⁸

45 J.C. Boogman, ‘The Union of Utrecht: Its Genesis and Consequences,’ *Bijdragen en meddelingen betreffende de geschiedenis der Nederlanden*, 94 (ND), 377–407 at 400–1.

46 See above, Chapter Five.

47 Immanuel Wallerstein, *The Capitalist World Economy* (Cambridge: Cambridge University Press, 1979), 121. ‘Far from being a system of competition of all sellers, it is a system in which competition becomes relatively free only when the economic advantage of the upper strata is so clear-cut that the unconstrained operation of the market serves effectively to reinforce the existing system of stratification.’ Wallerstein, *The Modern World-System I*, 16.

48 Immanuel Wallerstein, ‘The Inter-State Structure of the Modern-World System,’ in Steve Smith, Ken Booth and Marysia Zalewski (eds), *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), 87–107 at 89. From this, Wallerstein is able to conclude that:

at given times, under given circumstances, any [economic activity] may be either core-like or peripheral, high-profit or low-profit. What matters first and foremost is the degree to which the activity is (can be) relatively monopolized at a given point in time. The successful entrepreneurs (capitalists) discern what kind of economic activities have

The heterogenous logic of monopoly Capitalism was endemic to even the earliest phases of the World-Economy, altering conventional assumptions about statist economic practices conventionally defined as 'Mercantilism'. For World-Systems Analysis, 'mercantilist practices are not unique to the [17th century] but were utilized by *some* states at almost every moment of the history of the Capitalist World-Economy, although the ideological justifications have varied.'⁴⁹ Although formally predicated upon protectionist assumptions,⁵⁰ mercantilist economies were constantly subject to the pressures of free market forces, effectively precluding the historical emergence of a 'pure' mercantilist economy.⁵¹

The absence of a 'true' mercantilist State within the 'long' 16th century was due not only to the contradictory logic of the early Capitalist World-Economy, but also to the nature of Mercantilism as a form of *discourse*. Mercantilism temporally emerged 'as a series of written texts, pamphlets, texts and books.' At no point did it ever strictly correspond to an identifiable pattern of statist *praxis*; instead, Mercantilism constituted 'a literature, a discourse, on trade and economics which

the possibility in the short run of a high degree of monopolization, and whose products have or can be induced to have a considerable demand. A successful capitalist has no intrinsic commitment to product, to place, to country, or to type of economic activity. The commitment is to the accumulation of capital. Therefore, the capitalist will shift the locus of economic engagement (product, place, country, type of activity) as shifts occur in the opportunities to maximize revenues from undertakings.

Ibid.

- 49 Immanuel Wallerstein, *The Modern World-System II: Mercantilism and the Consolidation of the European World-Economy, 1600–1750* (New York: Academic Press, 1980), 37. These 'ideological justifications' usually centred upon the 'correct' relationship between rational calculations of state power—ordinarily defined as military strength—and overall economic production.

What, then, is the correct interpretation of mercantilist doctrine and practice with respect to the roles of power and plenty as ends of national policy? I believe that practically all mercantilists, whatever the period, country, or status of the particular individual, would have subscribed to the following propositions: (1) wealth is an absolutely essential means to power, whether for security or aggression; (2) power is essential or valuable as a means to the acquisition or retention of wealth; (3) wealth and power are each proper ultimate ends of national policy; (4) there is long-run harmony between these ends, although in particular circumstances it may be necessary for a time to make economic sacrifices in the interest of military security and therefore also of long-run prosperity...It is to be noted that no proposition is included as to the relative weight which the mercantilists attached to power and to plenty, respectively.

Jacob Viner, 'Power versus Plenty as Objectives of Foreign Policy in the Seventeenth and Eighteenth Centuries', in D.C. Coleman (ed.), *Revisions in Mercantilism* (London: Methuen, 1969), 61–91 at 71.

- 50 Eli Hecksher, 'Mercantilism', in D.C. Coleman (ed.), *Revisions in Mercantilism* (London: Methuen, 1969), 19–34 at 27–8.

- 51 See Viner, 'Power versus Plenty as Objectives of Foreign Policy in the Seventeenth and Eighteenth Centuries', *passim*; Charles Wilson, 'The Other Face of Mercantilism', in Coleman (ed.), *Revisions in Mercantilism*, 118–39, *passim*; Charles Wilson, *Mercantilism* (London: Historical Association, 1958), *passim*.

appeared mainly in one specific national context, the English, but was linked to other national discursive traditions as well; and to the polity and economy of the 'real' world.⁵² Nor was Mercantilism simply an ideological legitimization of the economic construct known as 'protectionism; originating in Spain at the School of Salamanca, the first recognisably mercantilist writers uniformly denounced Iberian trade policies as thwarting domestic economic development yielding a static condition of chronic *under*-development.⁵³ The key problem has been the simplistic reduction of Mercantilism to bullionism or chrysohedonism: the erroneous misidentification of 'wealth', or 'capital', to 'money'.

The historic source of this misconception has been discursive; the key mercantilist signifiers of 'stock' and 'riches' were applied in two different ways, as 'natural' and 'artificial'; the English mercantilist Thomas Mun was able to declare that natural riches 'proceedeth from territory it self', and the rival form of artificial riches 'dependeth on the industry of the Inhabitants.'⁵⁴ This rhetorical 'migration' between the natural and the artificial itself subverts any reductionist equation between material base and ideological infrastructure; throughout the 'long' 16th century, mercantilist writers clearly exhibited an essentially 'modern' notion of monetary theory.⁵⁵ It also clearly indicates that mercantilists thought

52 Lars Magnusson, *Mercantilism: The Shaping of an Economic Language* (New York: Routledge, 1994), vii. Mercantilism as discourse

implies an understanding of the history of economics as an evolving history of economic texts. Hence, as in this case, mercantilism is to be understood as a series of written texts and statements. Within such a discursive context a common set of questions, words, concepts and interpretative frameworks emerge which over time constitutes a specific language. Moreover, such language is self-reflective, and it supplies the categories through which reality and praxis are articulated. Self-reflectiveness does not imply, however, that language is disclosed from an outer world of praxis. Instead, the relation between language and praxis, *langue* and *parole*, is interactive.

Ibid. 211. This makes all the more glaring Magnusson's omission of any reference to the national discursive field of Mercantilism in the United Provinces; as even the most cursory reading of the English mercantilist writers makes clear, Holland was regularly presented as the exemplary State that had achieved the mercantilist goal of combining a favourable balance of trade with an adequate level of manufacture and population. Ibid. 148–51.

53 Cosimo Perrotta, 'Early Spanish Mercantilism: The First Analysis of Underdevelopment', in Lars Magnusson (ed.), *Mercantilist Economics* (Dordrecht: Kluwer Academic Publishers, 1993), 17–58, *passim*. The chronic deficiencies of the Iberian economy identified by the Spanish mercantilists included: primogeniture; shortage of available personal funds; rural depopulation; over-employment in under-productive 'sectors' (the Church and the civil service); prohibitive military expenditures; an arbitrary and corrupt taxation system; rent-seeking by the nobility; and an Absolutist political system. Ibid. 40–41. To say that mercantilistic 'language was a simple rationalization of some forms of economic state-making is utterly misleading' Magnusson, *Mercantilism: the Shaping of an Economic Language*, 211.

54 Cited in *ibid.* 154.

55 Perrotta, 'Early Spanish Mercantilism', 21.

that the development of the productive sectors—productionism and not mere circulationism—was critical to the creation of value.⁵⁶ This persistent yet easily remedied misperception is, in turn, indicative of a wider phenomenon that is central to our concern: the essentialisation of the 'Modern' and the 'Pre-Modern'.⁵⁷ The entrenched confusion over Mercantilism would appear to constitute yet one more instance of a wider refusal to recognise the underlying continuity between Modern and Pre-Modern forms, in this instance Capitalism. This is not an accident; during the development of Classical or laissez-faire economic theory in the 18th century advocates of Smithsonian economics habitually misrepresented Mercantilism as a way of grounding their own highly contentious theories upon a self-legitimizing 'Modernity';⁵⁸ 'In fact, the seventeenth century was the birthplace of something we might call "modern economics". And those who gave birth to this newborn child were the mercantilists.'⁵⁹

This 'birthing' appears to have occurred during the 1620s with a foundational 'mercantilistic revolution'—like all discursive formations, the master-sign was a pronounced self-reflectivity upon the terms and parameters of the discourse itself, in this case 'the emergence of an explicit and principal discussion on how wealth was created as well as distributed'.⁶⁰ The centrality of 'the market mechanism' was clearly appreciated, which, for the first time, was applied to price formation. Strikingly, the construct of subjective *ius* as Natural Law was employed in order to perform the 'work' later undertaken by the radically ontologically thinned notion of Smith's 'invisible hand'; the early mercantilists, especially those of the English variety, appear to have been acolytes of the Grotian theory of minimal civil society.⁶¹ This shift towards greater self-reflectivity, in turn underpinned what

56 Mercantilists

used concepts such as 'stock', 'the Nation's stock', or 'the Kingdome's stock' interchangeably in monetary or real terms. According to most writers, 'stock' in real terms could only be enlarged if production in physical or value terms rose above consumption. Furthermore, 'stock' in monetary terms could only increase from a net foreign surplus operating from a favourable balance of trade. Lastly, both 'surpluses' could be regarded as savings which in turn could be used to further increase the 'natural' or 'artificial' wealth of the nation.

Magnusson, *Mercantilism: the Shaping of an Economic Language*, 165.

57 See above, Chapter Two.

58 'It is clear that for Adam Smith the idea that the favourable-balance doctrine reflected a confusion of money and wealth was appropriate not the least for polemical reasons. Also for nineteenth-century free-traders the notion of an erroneous 'mercantile school' could serve to propel assurance in their 'system.' Ibid. 168. As Perrotta has observed, the 'distortion of mercantilist thought in general, squandering a great analytic and cultural heritage, has constituted a serious loss for economic theory.' Perrotta, 'Early Spanish Mercantilism', 41.

59 Magnusson, *Mercantilism: the Shaping of an Economic Language*, 7.

60 Ibid. 11.

61 'Most writers in the British mercantilist tradition argued on the basis of a "material" interpretation of man and society. In contrast to the sixteenth century, the moral

was arguably the single most important—and original—tenet of Mercantilism: that economic relationships constituted a *system*.

As in the natural world, the world of the market place was increasingly regarded as a system made up by inter-reacting ‘mechanical forces.’ This implied that an economic society was also structured in a law-like manner and relied on a number of principles which might be detected. The emphasis on system-like regularities implied that society operated in a predictable fashion. The market processes linked together variables such as prices, wages, interest rates, monetary value and exchange rates. A consequence of this was most certainly that the economic realm could be regarded independently from state and politics.⁶²

Mercantilism would appear to possess all of the essential characteristics that Wallerstein has identified as ‘scientific universalism’⁶³ Within the epistemological critique afforded by World-Systems Analysis, the development of Economics as both an independent field of study and as one founded upon the precepts of determinism and linearity is one of the primary signs of the emergent self-awareness of Universalist and Euro-centric Modernity. The ‘Baconian revolution’ of the ‘long’ 16th century, with the concomitant rise of induction as the favoured mode of logical analysis, constituted the vital core of the parallel ‘mercantilistic revolution.’ Especially important here was the

increased use of the notion that the nature [of the economy] was a system comprising almost nature-like laws. In this context, the frequent metaphorical use of the human body to signify the economic realm is highly characteristic. Another example is the developed use of the phrase ‘balance’—a concept originally developed by physicists to describe a state of equilibrium in the natural world. Without doubt the utilisation of this concept was connected with a new mechanical view of the world and society.⁶⁴

The mercantilist theory of economy-as-system suggests an iteration between system-as-economy and system-as-level-of-[economic]-analysis; employing the logic of scientific Universalism, the system-like properties of a single national economy can be extrapolated to either a regional or a global level.⁶⁵ The coeval status of Mercantilism with scientific Universalism is itself validated by the by the presence of the Capitalist World-Economy; the establishment of international

implications were kept in the background.’ Ibid. See also, *ibid.* 118, 125 and 214.

62 Ibid. 214.

63 See above, Chapter Two.

64 Ibid. 215.

65 Porretta has implicitly touched upon this point.

We can say that mercantilism was born in response to the failure of Spain [within the World-System]. *England's Treasure by Forraign Trade* by Thomas Mun, considered the manifesto of mercantilism, based its analysis on the contrast between the poverty of the Spanish, owners of ‘natural wealth’ (the gold and silver of the Americas), and

commercial networks and a universally 'translatable' system(s) of exchange(s) during the 'long' 16th century laid down the epistemological apparatus necessary to undertake the 'Baconian revolution'. Critical here was the explosion in the sheer volume of goods and items to be exchanged circulating throughout the World-System; the proliferation of new objects of knowledge undermined established taxonomic systems and forced a direct appeal to empirical induction, or 'experience'.⁶⁶ As the Capitalist World-Economy is the economic corollary of the Modern World-System, the inter-state system that historically emerged through the various conjunctures of the 'long' 16th century would have to be de-noted as 'early Modern'—that is, signified by the presence of *Mercantile*-Capitalism.

This underlying continuity of the Modern with the Pre-Modern—the latter acting as the (dangerous) supplement to the former—is further signified by the ubiquitous re-appearance(s) of Mercantilism within the national economic policies of 'modern' Nation-States, primarily in the form of a generic 'protectionism'.⁶⁷ Even more notable here are the striking parallels between 'Neo-Mercantilism' and Development Theory, the former acting as the first cognisable 'theory of under-development'. 'Mercantilists in the emerging countries of the 17th century faced the problems of original accumulation and initial growth; that is, the problems of the transition from an agricultural-craft economy to a manufacturing economy.'⁶⁸ The relationship between Mercantilism and the Marxist theory of original accumulation⁶⁹ is critical; predictably, the 'main originator of radical economics, Marx, seems on the whole to have said nothing very original about the

the nations that became rich through trade and through the production of 'artificial wealth', namely manufactured goods.

Perrotta, 'Early Spanish Mercantilism', 19.

66 Harold J. Cook, *Matters of Exchange: Commerce, Medicine, and Science in the Dutch Golden Age* (New Haven: Yale University Press, 2007), 410–16.

67 Gerard M. Koot, 'Historical Economics and the Revival of Mercantilism Thought in Britain 1870–1920', in Lars Magnusson (ed.), *Mercantilist Economics* (Dordrecht: Kluwer Academic Publishers, 1993), 187–220, *passim*; William J. Barber, 'Neomercantilism in American Official Thinking in the 1920s and Early 1930s', in Lars Magnusson (ed.), *Mercantilist Economics* (Dordrecht: Kluwer Academic Publishers, 1993), 221–34, *passim*. Germany and Japan are commonly taken as the supreme examples of both the practical success and theoretical relevance of 'Neo-Mercantilism'. Neo-Mercantilism, in turn, is inseparable from the World-System, reflecting what Hettne has identified as the '*modernization imperative*': 'the felt need among rising nations to catch up with more advanced industrial economies in order to avoid being eaten, or, in more recent dependency terms, being 'peripheralized'. Although not reducible to statism, Neo-Mercantilism is directly linked to the development of *stateness*, 'the integrative strength of the nation-state' as a competitive actor embedded within the political and economic logic of a '*world order*'. Bjorn Hettne, 'The Concept of Neomercantilism', in Lars Magnusson (ed.), *Mercantilist Economics* (Dordrecht: Kluwer Academic Publishers, 1993), 235–55 at 240 and 238.

68 Perrotta, 'Early Spanish Mercantilism', 41.

69 See above, Chapter Two.

mercantilists.⁷⁰ This is not very surprising; Marxist economic theory is predicated upon the foundational precepts of Classical economic theory, especially that of David Ricardo.⁷¹ As a result, Marx largely recapitulates Smith's own 'modernising' dismissal of Mercantilism as chrysohedonism, or 'profit upon alienation.'⁷² However, as Magnusson points out, there is a supplement to the theory of the transition from Feudalism to Capitalism that Marx privileges, one that is 'dangerously' conducive to an alternative reading of Mercantilism as modern economics. In order to achieve Capitalism, the peasant-worker must be forcibly removed from the agrarian mode of production and coercively transformed into an industrial proletariat. However, the primary source of 'capital'—that is, 'wealth' as a total 'social relation'—'must also be created through means of international exploitation—mainly by trade—which later on can be invested in industrial production.' In this supplemental reading of Marx, Mercantilism is no longer a form of mystified economic ideology, but the dangerous supplement to Capitalist Modernity. The capture of both the endogenous peasantry/proletariat and the exogenous foreign market (the 'colony') secured through the 'extra-economic' mechanisms of forcible expropriation, re-locate original accumulation at the centre of the originary grounds of Capitalism.⁷³ Mercantilism, precisely because it is 'Modern' and because it places colonialism and colonial trade at the centre of the Capitalist World-Economy, constitutes the dual signification of the mercantile-capitalist nature of the (early) Modern World-System; that is, the modern/colonial world-system.

The irresistible logic, over the long term, of the total monopolisation of the East Indies trade—juro-politically expressed as exclusionary title, as both *proprietas* and its maritime equivalent *mare clausum*⁷⁴—was perfectly suited to the structural characteristics of the spice trade, preciousities being the primary export commodity of the Indian Ocean world system.

70 Magnusson, *Mercantilism: the Shaping of an Economic Language*, 51.

71 'Marx constructed a line of intellectual development which connected Petty, Smith and Ricardo with himself—in order to point out the revolutionary impact in economic theory of the labour theory of value.' Ibid. 14. Hettne is even more blunt: 'Without a Ricardo, there would have been no Marx.' Hettne, 'The Concept of Neomercantilism', 240.

72 Ibid.

73 Ibid. 52. Michael Perelman, 'The Secret History of Primitive Accumulation and Classical Political Economy', at <http://www.thecommoner.org>, September 2001, 1–21, *passim*.

74 S. Arasaratnam, 'Mare Clausum, the Dutch and Regional Trade in the Indian Ocean 1650–1740', *Journal of Indian History*, 61 (1983), 73–91, *passim*; S. Arasaratnam, 'Monopoly and Free Trade in Dutch-Asian Commercial Policy: Debate and Controversy within the VOC', *Journal of Southeast Asian Studies*, 4/1 (1973), 1–15, *passim*; M.A.P. Meilink-Roelofs, 'Aspects of Dutch Colonial Development in Asia in the Seventeenth Century', in J.S. Bromley and E.H. Kossman (eds.), *Britain and the Netherlands in Europe and Asia* (New York: St. Martin's Press, 1968), 56–82, *passim*.

The great import from Asia to Lisbon was pepper, or pepper and spices.⁷⁵ Already at the end of the fifteenth century before Portugal was in the picture, Europe probably consumed a quarter of Asia's production; and, to meet the increased demand of Europe, Asian production doubled over the course of the next century. In return, what Asia principally got from Europe was bullion, silver and gold.⁷⁶ The silver came largely from the Americas and Japan. The gold seems largely to have come at first from West Africa, then from Southeast Asia, Sumatra and China.⁷⁷

The political imperative of the spice trade was the evolving capitalist class structures within the core zones that invested the low-bulk preciousities with an incomparable economic value; 'what we term 'luxuries' were no more than the necessities of the rich and powerful, whose import interest largely determined foreign policy.'⁷⁸ Ironically, the more successfully the VOC penetrated the Indian Ocean sub-system, the more it was compelled to advocate protectionism and restrictive

75 The 'quality' spices were nutmeg, mace, cloves and cinnamon. Pepper was a 'bulk' commodity. See Om Prakash, 'The Dutch East India Company in the Trade of the Indian Ocean', in Ashin Das Gupta and M.N. Pearson (eds), *India and the Indian Ocean 1500–1800* (Calcutta: Oxford University Press, 1987), 185–200, *passim*.

76 Tellingly, bullion was the main cargo of the *Santa Catarina*, along with a large consignment of Chinese porcelain and silk, and Japanese copper

77 Fernand Braudel, *The Perspective of the World* (New York: Harper & Row, 1984), 329.

78 Polyani, cited in Andre Gunder Frank and Barry K. Gill, 'The 5,000-Year World System: An Interdisciplinary Introduction', in id. (eds), *The World-System: Five Hundred Years or Five Thousand?* (New York: Routledge, 1993), 3–55 at 6. The historical vicissitudes of the early modern spice trade are a striking confirmation of the centrality placed upon trans-national class structures and relationships by World-Systems Analysis.

Luxury only translated into status if [preciosities] were deployed according to canons of taste, which began to change more rapidly than they did in the past: these canons were purely a defence by old elites against too simple a translation of new wealth into status through corruption. This rise of 'fashion' dictated that even those who owned large amounts of such durable goods as furniture or crystal would feel increasingly pressured to buy new goods, so that demand for these goods, while still experienced as *socially* necessary, became even more unmoored from any sort of physical necessity.

Kenneth Pomerantz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton: Princeton University Press, 2000), 114. Compare this with Shivelbusch:

Spices as a link to Paradise, and the vision of Paradise as a real place somewhere in the East—their source—fascinated the medieval imagination. The exorbitant price of spices, which reflected the extremely long trade route from India to Europe, further enhanced this fascination. Pepper, cinnamon, and nutmeg were status symbols of the ruling class, emblems of power which were displayed and then consumed. The moderation or excess with which they were served attested to the hosts social rank. The more sharply pepper seared the guest's palates, the more respect they felt for their host. The symbolic value appears also in the use of spices beyond meals and banquets. They

trade practices; the higher the rate of profits from preciousities, the more compelling the need to ensure political control over production and distribution. 'If the Dutch company [was] to become one more among many competing carriers, the result would be to raise prices in Indonesia and probably glut the European market.'⁷⁹ Accordingly, the VOC could pre-empt market chaos 'only by doing what the Portuguese had failed to do; by controlling all the main sources of supply.'⁸⁰ It must also not be forgotten that it was precisely by means of such monopolisation that the VOC guaranteed the saturation of the core-zone with that proliferation of preciousities and new floral and fauna species that precipitated the self-sustaining 'Baconian Revolution' within mercantilist discourse.⁸¹

The explosion of the spice trade, in turn, necessitated the expansion of European bullion reserves, which directly fuelled a territorialist model of expansion; with little to trade with (the primary European export at this time being wool), world-empire provided the core states with the only practicable means of guaranteeing direct access to sufficient bullion supply at (initially) sustainable costs.⁸² The territorialist forays of Portugal and Spain into the 'New World' (*la Conquista*) served as the short-term solution; maritime States such as Holland and England parasitically benefited through their Privateering (=Piratical) enterprises which, in addition to functioning as a highly effective means of interstate warfare, served as a fairly reliable medium-level supply of vitally needed bullion. The Spanish seizure of Antwerp in 1585 was of momentous significance in this regard; with the resultant shift of the centre of European banking to Amsterdam, Dutch spice traders/privateers were able to subsidise an enormous expansion of their

were presented as gifts of state, and were bequeathed together with other heirlooms; in fact, pepper frequently took the place of gold as a means of payment.

Wolfgang Shivelbusch, *Tastes of Paradise: A Social History of Spices, Stimulants, and Intoxicants* (New York: Pantheon Books, 1992), 6–7. Schneider has convincingly demonstrated the centrality of the role of spices/preciousities as 'gifts' played in the maintenance of Pre-Modern power/clientele relationships. Jane Schneider, 'Was There a Pre-Capitalist World-System?', *Peasant Studies*, 6/1 (1977), 20–9, *passim*.

79 Braudel, *The Perspective of the World*, 220.

80 J.H. Parry, *The Age of Reconnaissance* (New York: Mentor Books, 1963), 249–50. In fact, the original incorporation of Jan Company belied an ultimately monopolistic intent. 'The unification of the so-called pre-companies of the 1590s engaged in trade between the Netherlands and the East Indies into the VOC, which was chartered in March 1602, must be considered essentially as a first step in the Dutch efforts to control the spice trade between the two continents.' Om Prakash, 'Restrictive Trading Regimes: the VOC and the Asian Spice Trade in the Seventeenth Century', in M.N. Pearson (ed.), *Spices in the Indian Ocean World* (Aldershot: Variorum, 1996), 317–36, *passim*.

81 Cook, *Matters of Exchange*, 65–8.

82 'Pepper was the principal commodity imported from the East and silver bullion was the principal export to "Golden Goa"...For most of the sixteenth century the Malabar pepper traders refused to accept payment in anything but gold.' Boxer, *The Portuguese Seaborne Empire*, 52 and 60.

competitive share of the preciousities market directly, boosting Amsterdam's status as an international financial centre which, in turn, underwrote Dutch state-building by providing a massively favourable trade balance.⁸³ Whatever the exact profitability of the colonial possessions, the crucial factor here was the institutional nexus between *Die Heeren XVII* and the Amsterdam banking sector; the returns on the spice trade effectively underwrote the global ascendancy of Dutch financial institutions securing international economic dominance to the United Provinces,⁸⁴ a necessary attribute of hegemony.

The sheer magnitude of profit involved, coupled with the financial, political, and military centrality of the preciousity trade for Dutch state- and war-making efforts, ultimately proved too great a temptation to resist, subverting the United Province's and the VOC's hitherto effective reliance upon the orthodox hegemonic strategy of *liberum commercium*.⁸⁵ Van Ittersum has demonstrated that the Grotian construct of *mare liberum* had indeed become the Company's official legal and rhetorical position;⁸⁶ however

As soon as the Dutch came into the [spice] trade they encountered the basic problem of trade in an external area. Because it was a trade in luxuries, profits were high and competition keen; but because it was a trade in luxuries and not necessities, the market was inherently small, and glutting the market was a serious possibility—Scylla and Charybdis. There were only two ways to handle this dilemma. Either one transferred

83 Chaunu, cited in Fernand Braudel, *The Structures of Everyday Life: the Limits of the Possible* (New York: Harper & Row Publishers, 1981), 329:

120[000] to 150,000 tons of spices were bought, almost without merchandise in return, for 150 tons of gold, which the weight of domination had seized from the feeble African societies, and a quantity of specie difficult to calculate, but not at all comparable to the 6000 tons of equivalent silver which remained to be made up.

84 Jonathan I. Israel, *The Dutch Primacy in World Trade* (Oxford: Oxford University Press, 1982), 75–6 and 256–8; Braudel, *The Structures of Everyday Life*, 100–6; Braudel, *The Perspective of the World*, 224–7.

85 There is clear evidence that the Gentlemen VXII were opposed to territorialism on the grounds of cost/benefit analysis alone. The economic efficiency of the disparate *voorscompagnieen* prior to incorporation was evidenced in their eyes by an outlay for military expenditures in excess of thirty percent of total operating costs. From 1605–12, the construction and provisioning of the comparatively small number of Dutch fortresses in the Malaccas came to 1.72 million florins, approximately one-third of Company costs. Intriguingly, these 'official' Company estimates appear to have been the private calculations of Grotius himself. Geoffrey Parker, 'Europe and the Wider World, 1500–1750: the Military Balance', in James D. Tracy (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 161–95 at 179. 'It was clear to both Grotius and the VOC directorate that maintaining an extensive armed presence in the East Indies was an expensive affair that ultimately diminished the Company's profits.' Peter Borschberg, 'Hugo Grotius, East India Trade and the King of Johor', *Journal of Southeast Asian Studies*, 30/2 (1999), 225–48 at 244.

86 Van Ittersum, *Profit and Principle*, 355–8.

the nature of the trade by incorporating the Indies as a peripheral zone of the capitalist world-economy or one had to resort to 'administered' trade in the traditional fashion of the long-distance commerce between world-empires. Which path to follow was in fact the subject of the ongoing debate between [Jan Pieterzoon] Coen and *Die Heeren Zeventien*. Coen, the 'partisan of the strong manner in Asia,' pushed for the first option; his superiors in Amsterdam for the second.⁸⁷

In Coen's inestimable language, from 'experience, your lordships ought to know very well that in India trade is driven and maintained under the protection and favour of your own weapons, just as the weapons are furnished from the profits of trade, in such wise that trade cannot be maintained without war, nor war without trade.'⁸⁸ The overriding need to guarantee economic predictability and sustainable rates of profitability commensurate with Holland's World System role as hegemon necessitated a concomitant shift in the nature of Corporate Sovereignty, from joint-stock company to cartel.⁸⁹ This structural transformation, in turn, rendered long-term cost prohibitive territorialism inevitable.

Coen said that peripheralization of the East Indies would require a policy of colonization in two senses: establishing political control in order to constrain relatively strong Asian potentates and reorganize the system of production, and exporting a white settler class, both to help with supervising cash-crop production and to provide a secure initial market for European exports other than bullion. He said that such a policy was incompatible with administered trade, and required the operation of a market principle. The terminology in which this was discussed is often referred to, somewhat misleadingly, as free trade versus monopoly; but in fact Coen was not opposed to the VOC monopolizing *in the market* (and indeed with a judicious assist from time to time by state force);

87 Wallerstein, *The Modern World-System II*, 47.

88 Letter from Jan Coen to the Gentlemen XVII, Bantam, 27 December, 1614. Cited in James D. Tracy, 'Introduction', in id. (ed.), *The Political Economy of Merchant Empires* (Cambridge: Cambridge University Press, 1991), 1-21 at 1. See Parker, 'Europe and the Wider World, 1500-1750', *passim*.

89 Peter Musgrave, 'The Economics of Uncertainty: the Structural Revolution in the Spice Trade, 1480-1640', in M.N. Pearson (ed.), *Spices in the Indian Ocean World* (Aldershot: Variorum, 1996), 337-49 at 349:

Perhaps in the very long term the most significant feature of this structural revolution [in the spice trade] was the developing habit and ability of the Company to act as a cartel, to manage supply in such a way as to maintain a price structure advantageous to itself and deleterious to its competitors. The policy of licensing and controlling production in Indonesia—the 'policy of frightfulness' which reached its apogee under Coen—can be seen as an attempt to establish a monopoly of supply; in economic terms, perhaps, it is better to see it as an attempt to control a large proportion of the supply of spices since, with such control, the Dutch could (and did) easily squeeze out their competitors. At the European end of the trade, too, the Company's capitalization was sufficiently large to allow it to hold back supplies, or [to flood the market thereby guaranteeing] the dependent relationship between Asian producers, European companies and world markets.

nor were *Die Heeren Zeventien* unaware of the limits of their ability to restrict access to their administered trade over such great distances.⁹⁰

IV Vitoria and the Indians: 'Dispossessing the Barbarian'

Logically, any shift towards territorialism would be discursively accompanied by Civic Humanism, overt incorporation legitimated by the rhetoric of *Civitas*. This proved impossible in the case of *De Indis*, however. The subordinate status of Aristotelianism as the 'repressed' pole of the Text precluded any easy reliance upon a 'thin' ontological justification of political subjugation. Furthermore, the historical context of textual production proved inadequate; at the time of composition, Dutch territorial holdings were scant,⁹¹ with large-scale conquest not initiated until the relatively late date of 1641, with the Dutch seizure of the Malaccas.⁹² Instead, *De Indis* undertakes the far more interesting task of preparing the grounds for a potential dispossession of Indigenous Peoples through the discourse of Naturalism. Once again, the linkage with Vitoria proved crucial.

As discussed in Chapter Three, Vitoria's ultimate purpose was the legitimation of Habsburg primacy within the New World. Despite the Spanish Monarchy's express reliance upon the Treaty of Tordesillas, Vitoria endeavoured to provide an alternative basis for legitimation along non-Hieratic lines; paradoxically, this is premised upon the *inalienability* of Indigenous rights. It has long been recognised that Vitoria's writings contain an objective, albeit latent, rationalisation of colonisation,⁹³ Late Scholasticism underpinning the Indian Law of the Spanish territories of the New World.⁹⁴ Once more, the juro-discursive manipulation

90 Wallerstein, *The Modern World-System II*, 47–8.

91 In the early 17th century Dutch colonial holdings were restricted to the islands of Banda and Amboina, along with the immediate area surrounding Batavia. Meilink-Roelofsen, 'Aspects of Dutch Colonial Development in Asia in the Seventeenth Century', 73.

92 And even here the Company proved hesitant. 'It was only in the following years that development in the direction of territorial possession began, and even then it was gradual and contrary to the will and intention of the directors in the Netherlands.' Ibid. 70; see also, *ibid.* 70–7.

93 G.C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas', *Australian Yearbook of International Law*, 13 (1990–91), 1–51 at 11–14; Robert A. Williams, 'The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought', *Southern California Law Review*, 57 (1983), 1–99 at 63–9; Carl Schmitt, 'The Land Appropriation of a New World', *Telos*, 109 (1996), 29–80 at 43–55.

94 Felix Cohen, 'The Spanish Origins of Indian Rights in the Law of the United States', *Georgetown Law Journal*, 31 (1942), 1–21, *passim*; Williams, 'Documents of Barbarism', *passim*; Robert A. Williams, 'The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence', *Wisconsin Law Review*, 1986, 219–99, *passim*.

of the concept of the Just War proves crucial to the political stratagems of the primitive legal Text.

[Vitoria's] entire organizational schema separates the spheres of Spanish and Indian authority, preventing a direct clash between these two sovereign authorities within a single divine order. Vitoria imagined that legitimate Spanish title right to be obtained either by Indian consent or as a result of some Indian violation of some Spanish 'right' which entitled the Spanish to 'right' the 'wrong' to enforce the precepts of divine law.⁹⁵

Although Vitoria formally rejects the Aristotelian doctrine of 'natural slavery',⁹⁶ the logic of the dangerous supplement continues to operate through the mimetic substitute of the 'civilisational' concept of 'tutelage'.⁹⁷

These barbarians, though not totally mad... are nevertheless so close to being mad, that *they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms...* It might therefore be argued that for their own

95 David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27/1 (1986), 1–98 at 27. See Grotius, *De Indis*, 224: 'There was no pretext that the Portuguese could offer for going to war, since anyone who makes war upon barbarians (as the Spanish did upon the American Indians) is wont to advance one of two pretexts: either that he is prevented by the said barbarians from engaging in trade, or else that the latter refuse to accept the doctrines of the true faith.'

96 Vitoria, 'On the American Indians', 247–51. The classic exposition of the West Indian as 'natural slave' was offered by the Aristotelian and Humanist scholar Juan Gines de Sepulveda (1490–1573) during the 'debates' at Valladolid from 1550–51. In marked opposition to the Late Scholastic Las Casas, Sepulveda offered a classically Aristotelian rationale for the forcible conversion of the Aborigines on the basis of natural slavery.

The war and conquest [of the West Indies] are just first of all because these barbaric, uneducated, and inhuman [Indians] are by nature servants. Naturally, they refuse the governance which more prudent, powerful, and perfect human beings offer and which would result in their great benefit. By natural right and for the good of all, the material ought to obey the form, the body the soul, the appetite the reason, the brutes the human being, the woman her husband, the imperfect the perfect, and the worse the better.

Cited in Enrique Dussel, *The Invention of the Americas: Eclipse of 'the Other' and the Myth of Modernity* (New York: Continuum, 1995), 63. What is important for our purposes is the fact that it was the Humanist advocates of Aristotelian *Civitas* who openly endorsed conversion by fire and the sword, the juro-theological correlative to territorialism. See Lewis Hanke, *Aristotle and the American Indians: A Study of Race Prejudice in the Modern World* (London: Hollis & Carter, 1959), *passim*. In a typical piece of biased twentieth-century misreading of historical realities, Hanke cites Ramon Mendez Pidal's revealing comment that the struggle at Valladolid 'was merely between the humanitarianism of Las Casa and the humanism of Sepulveda.' *Ibid.* 95.

97 Vitoria, 'On the American Indians', 290–1.

benefit the princes of Spain might take over their administration, and set up urban officers and governors on their behalf, or even give them new masters, so long as this could be proved to be in their interest. As I have said, this argument would be persuasive if the barbarians were in fact mad; and in that case, it is beyond doubt that such a course would be not merely lawful, but wholly appropriate, and princes would be bound to take charge of them as if they were simply children. In this respect, there is scant difference between the barbarians and madmen; they are little or no more capable of governing themselves than madmen, or indeed wild beasts.⁹⁸

From this follows the self-subverting conclusion that '[in] this connection, what was said earlier about some men being natural slaves might be relevant (1.1).⁹⁹ All these barbarians appear to fall under this heading, and they might be governed partly as slaves.'¹⁰⁰ Secondly, the necessity of evangelisation, itself premised upon divine law, legitimises Iberian dispossession of recalcitrant Aborigines. Once again, the discursive subject of the primitive Text is not the non-European Other, but the contending versions of European identity. The entire issue of proselytism is only taken up by Vitoria at all in order to re-enforce his overriding demonstration the subordination of hieratic *in spiritualibus* to profane *in temporalibus*.

My second proposition is that although this right [to preach] is common and lawful for all, *the pope could nevertheless have entrusted this business to the Spaniards and forbidden all others*. The proof is that although the pope is not a temporal lord, as is shown above (2.2),¹⁰¹ he nevertheless has power in temporal things, insofar as they concern spiritual things. And since it is the pope's special business to promote the Gospel throughout the world, if the princes of Spain are in the best position to see to the preaching of the Gospel in those provinces, the pope may entrust the task to them, and deny it to all others. He may restrict not only the right to preach, but also the right to trade, if this is convenient for the spreading of the Christian religion, because he has the power to order temporal matters for the convenience of spiritual ones.¹⁰²

The latter category proves crucial to Vitoria. Spanish missionary efforts served a vital imperialist purpose. Furthermore, the Treaty of Tordesillas, constituting a wholly legitimate exercise of *in temporalibus* in the pursuit and enforcement of *in spiritualibus*, expressly mandated them. Not only was the neo-Thomist view on papal temporality safely ensconced within Vitoria's taxonomy, but the Spanish secular authorities were now clearly mandated by both Canonical and Natural Law to implement Just War against the 'anti-natural' Aborigines of the New World.

98 Ibid. 290.

99 Ibid. 239–40.

100 Ibid. 291.

101 Ibid. 258–64.

102 Ibid. 284.

The belligerent does not thereby have the power to eject the enemy from their dominions and despoil them of their property at whim; he can act only so far as is necessary to ward off injustices and secure safety for the future. It follows that, if there is no other method of ensuring safety except by setting up Christian princes over [the infidel], this too will be lawful, as far as necessary to secure that end.¹⁰³

From this follows

My fourth conclusion... that if the barbarian, either in the person of their masters or as a multitude, obstruct the Spaniards in their free propagation of the Gospel, the Spaniards, after first reasoning with them to remove any cause of provocation, *may preach and work for the conversion of that people even against their will*¹⁰⁴ and may if necessary take up arms and declare war on them, insofar as this provides the safety and opportunity needed to preach the Gospel. And the same holds true if they [the Indians] permit the Spaniards to preach, but do not allow conversions, either by killing or punishing the converts to Christ, or by deterring them by threats or other means. This is obvious, because such actions would constitute a wrong committed by the barbarians against the Spaniards as I have explained, and the latter therefore have just cause for war. Second, it would be against the interests of the barbarians themselves, which their own princes may not harm, so the Spaniards could wage war on behalf of their subjects for the oppression and wrong which they were suffering, especially in such important matters.¹⁰⁵

Employing contemporary legal terminology, I would liken Vitoria's account of the 'Infidel Kingdom' to the 'failed state' of Jackson's Quasi-Sovereign,¹⁰⁶ a *de facto* legal personality wholly dependent upon the voluntary recognition of the 'true' sovereigns of the international community; and, therefore, capable of suspension. Vitoria himself establishes the analogy through his express reliance upon the great anti-Infidel Pope Innocent IV (1243–54);¹⁰⁷ 'in this case, there is truth in the opinion held by Innocent IV... that sinners against nature may be punished.'¹⁰⁸

103 Francisco de Vitoria, 'On Dietary Laws, or Self-Restraint', in id., *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 205–30 at 225–6.

104 Vitoria is unremittably opposed to forcible conversion.

105 Vitoria, 'On the American Indians', 261–63.

106 See above, Chapter Seven.

107 Williams, *The American Indian in Western Legal Thought*, 43–50.

108 Vitoria, 'On the American Indians', 288. Vitoria's primary discussion of this point is in Q.2, Art.5.

Innocent IV in his commentary on the decretal Quod super his (X.3, 34.8)... expressly says, 'I believe that if the gentiles break natural law, which is the only law they have, they may be punished by the pope.' He adduces to this purpose the fact that the Sodomites were punished by God (Gen. 19); 'since God's judgements are examples to us, I do not see why the pope, who is the vicar of Christ, should not be empowered to do the same.'

The second variant of the dangerous supplement lies embedded within the inalienable contractual powers and obligations of the Native principalities themselves. In accordance with the logic of Private War, the *Santa Catarina* merits classification as booty of the local Private Avenger, in this instance the VOC.

Since the spoils acquired through private warfare become first of all and in their entirety the property of him who is the author of a just war up to the point where the debt owed him is satisfactorily discharged... it will readily be granted that the carrack and captured merchandise of which we are speaking... have become possessions of the East India Company, at whose private expense this war has been conducted. For we have made it clear that acquisition of spoils plays a part in private warfare no less than in public warfare.¹⁰⁹

The discursive difficulty with this stratagem is that *De Indis* also expressly requires Indigenous assistance in the hegemonic anti-Portuguese alliance. Although Iberian title must be abnegated, the Text cannot politically afford to unconditionally extend *res nullius* into the territorial waters of Indian allies.

Frisson is temporarily alleviated through the re-formulation of the issue of booty in terms of Indigenous sovereignty and 'civil' (i.e., municipal) law. Here, the investiture of native principalities with sovereignty, derived from *ius naturale*, is critical; by recognising Aboriginal rulers as monarchs, the Dutch are lawfully enabled to enter into binding, and, if necessary, exclusive contracts with them; 'There is in India a kingdom called Johore, which has long been considered a sovereign principality, so that its ruler clearly possessed the authority necessary to conduct a public war.'¹¹⁰ In 1602, at the time of the incorporation of the VOC the Sultan Ala'ud-din Ri'ayat Shah III (d.1613) was seeking lawful ways to terminate the exclusive trade concessions that he had granted the Portuguese and to enter into direct commercial relationship with the other Europeans.¹¹¹ It was also in Sultancy waters that the *Santa Catarina* had been seized, Dutch privateers operating in the territorial waters through the 'suffrage' extended them by local authorities, keen to implement an anti-Portuguese military policy. By his authorisation of the presence of the Dutch privateers within the kingdom's territorial waters, the Sultan had implicitly 'granted' or transferred the right to the prize to the Dutch, thereby alienating himself from any claim to the spoils.

So says Innocent; and by his argument, they might also, on the pope's authority, be punished by Christian princes.

Ibid. 273.

109 Grotius, *De Indis*, 281.

110 Ibid. 314.

111 Borschberg, 'Hugo Grotius, East India Trade and the King of Johor', 230–41; Van Ittersum, *Profit and Principle*, 400–83.

[*The Santa Catarina*] was also capable of becoming a Dutch right through a grant on [the Sultan of Johore's] part. Moreover, since war was waged on his behalf¹¹² by means of ships belonging to the East India Company, at the Company's expense and its peril... as well as by the exertions of the Company's servants, without any formal agreement as to the compensation, the commonly accepted usages of war, confirmed by natural equity, clearly indicate that the prize in question was acquired *ipso jure* for the Company.¹¹³

The political dangers posed to Indigenous Peoples by the iterability of the Text are obvious; if the Sultanate of Johore, as a Legal Personality within a minimalist Civil Society, could legitimately transfer the 'public' right/power of defence to the 'private' person of the VOC, what objective lines of demarcation could be found to render ultra vires the *in toto* conveyance of Sovereignty? Potentially, the Kingdom could voluntarily (*ius voluntarium*) make itself the tributary of either the United Provinces, or, with equal legitimacy, the Company, an international personality in its own right.¹¹⁴ Conversely, if the Sultanate refused to honour its 'alliance' with the Dutch or refused any future unilateral encroachment by the Company, the VOC would be in a lawful position to condemn the Kingdom of violation of *pacta sunt servanda*, a fundamental breach of *ius naturale*, causing their Indian 'allies' to lapse into the pariah status of Infidel(-Pirate), one with whom no compact may be kept and against whom *bellum iustum* may be waged.

The latent threat to Aboriginal sovereignty becomes even greater when these considerations are read alongside the Grotian doctrine of *occupatio duplex*. Although originally deployed to defeat an exclusionary Portuguese title to the High Seas, it could be instantly inverted to legitimately dispossess Natives of their *proprietas* of 'unattached' lands, this serving as a 'primitive' form of *terra nullius* doctrine, as Locke was to do with the Amerindians in the early 18th century.¹¹⁵ Minimal Civil Society and Divisible Sovereignty both ultimately serve the logic of political expropriation; 'foreigners may, through appropriate procedures of

112 The benevolent 'serpent-slaying' Private Avenger at work.

113 Grotius, *De Indis*, 316. See *ibid.* 314:

This ruler [the Sultan] asked for help in warfare, from the Hollanders who had come to his land with their ships. Now, we have shown... how well it accords with human brotherhood that one person should give aid to another, and therefore we readily see that the entrance of the Dutch into the war as allies of the King of Johore was permissible. One may go farther and say that, since the Hollanders were well able to assist him thus, they could hardly have remained guiltless while withholding assistance.

Here, the need to aid is, presumably, logically dictated by the necessity to resist the 'piratical' Portuguese in their illicit interference with *liberum commercium*.

114 Keene, *Beyond the Anarchical Society*, 50–1 and 57.

115 John Locke, *Two Treatises of Government*, ed. with Introduction by Peter Laslett (Cambridge: Cambridge University Press, 1988), 'Second Treatise', C. V, 'On Property', 285–302. The Grotian theory of *occupatio duplex* directly facilitated the later emergence of the Lockean theory of land appropriation.

This embryonic form of the labour theory of property becomes central to Locke's theories of both natural law and rights and [was] used to justify England's right of property

course, acquire ownership rights to territory in another state, without interfering with the sovereign jurisdiction that a ruler has over his or her subjects.¹¹⁶ The quintessentially Derridean irony here is that *De Indis*, originally premised upon the inalienability of Indigenous Rights (contra the Portuguese) in fact served as a near-perfect expression of the positive right of the Dutch to lawfully expropriate, any seizure easily rationalised as a 'spoil' of a Just War.

This irony is only enhanced when one recalls that in the original manuscript of *De Indis* Grotius had inserted the key phrase '*Alia enim India, alia Americana ratio est*'—that India is different from the New World. Significantly, this sentence was crossed out and did not appear in *Mare Liberum*.¹¹⁷ In a deft deconstructionist move, this deletion of a Textual fragment alters the meaning of the total work, establishing a strict similitude between the West and East Indies, this in place of a prior but now absent authorial declaration of difference. This underscores the discursive arc established between the dyadic Texts concerning the Indies, the West for Vitoria's *De Indis*, and the East for Grotius' *De Indis*¹¹⁸—and not Admiralty law or Privateering as the misleading alternative title of *De Iure Praedae* would have us to believe.

V Occidentalism and Orientalism: The Transversal of the Indies

As was appreciated to an equal degree by both Adam Smith and Karl Marx, the temporal establishment of the early Modern World-System, a World Mercantile-Capitalist economy, was a foundational act premised upon two, albeit discursively iterable poles: the West Indies *and* the East Indies. It is precisely by means of this double emergence that 'Modernity'¹¹⁹ is historically constituted during the 'long' 16th century, itself exhibiting the trace of a 'double discourse' of alternating formations: Occidentalism and Orientalism. Of these two discourses, Orientalism is by far the better known, thanks to the pioneering work of Edward W. Said. Yet, it is one of the most striking characteristics of Said's work that he un-consciously replicates the meta-narrative logic of Euro-centrism by locating the discursive

not only against other European countries, as Grotius claims, but against the American Indian's claims of occupancy by virtue of hunting and gathering.

Arneil, 'John Locke, Natural Law and Colonialism', 592; see also, Olivecrona, 'Appropriation in the State of Nature', 223:

Locke made use of appropriation as Grotius employed, but on a far larger scale. Grotius allowed appropriation without the consent of others only in the earliest stages of the world and presumably for very limited purposes; it lost its importance with the introduction of dominium by way of convention. Locke, on the contrary, made appropriation the beginning and foundation of the right of property.'

116 Ibid. 57.

117 Alexandrowicz, *Introduction*, 47, fn.1.

118 C.H. Alexandrowicz, 'Grotius and India', *Indian Yearbook of International Affairs* (1954), 357–69, *passim*.

119 See above, Chapter Two.

emergence of Orientalism in the 18th century, the era of the allegedly foundational 'Enlightenment'. Said's reason for doing so is immediately apparent: as Orientalism is the historically indispensable first articulation of a Modernity that is premised upon a radically differential mode of self-consciousness, such a discursive formation must be self-same as The Enlightenment, Modernity's self-professed originary. In a very revealing passage at the very beginning of *Orientalism*, Said declares that

Americans will not feel quite the same about the Orient [as Old World Europeans], which for them is much more likely to be associated very differently with the Far East (China and Japan, mainly). Unlike the [New World] Americans, the French and the British... have had a very long tradition of what I shall be calling Orientalism, a way of coming to terms with the Orient that is based on the Orient's special place in European western experience. The Orient is not only adjacent to Europe; it is also the place of Europe's greatest and richest and oldest colonies, the source of its civilizations and languages, its cultural contestant, and one of its deepest and most recurring images of the Other.¹²⁰

If we follow Said's analysis and understand nebulous Modernity as constituting a dichotomous consciousness of Self/Other as the discursive correlate of a Modern World-System,¹²¹ then Said would be correct in affording historical pre-eminence to both Orientalism and the 'Orient'—alternatively, the 'East Indies'—as the Self's primary and definitional Other. However, at this point it becomes necessary to return to World-Systems Analysis and utilise its critical apparatuses as a means of contesting Said's own 'Oriental-centric' account of Modernity. Said is correct to implicitly correlate Modernity with the capitalistic modern/colonial system; however, he fails to take into full account the localised spatial and temporal vicissitudes historically undergone by the system. His somewhat simplistic identification of Modernity with 'The Enlightenment' is very much the product of the highly contingent evolution of the Capitalist World-Economy within the Indian Ocean (sub-) world system.¹²² Prior to the 18th century, the core-zone states were physically unable to effectively incorporate the Indian Ocean system; at best, they were only able to penetrate it. The absence of full peripheralisation allowed the regional sub-system of the Mediterranean to thrive until the relatively late date of the 1600s. Said's naïve belief in the centrality of the 18th century as the era of

120 Edward W. Said, *Orientalism: 25th Anniversary Edition* (London: Penguin Books, 2003), 1.

121 Edward W. Said, *Culture and Imperialism* (New York: Vintage Books, 1993), 52:

In an important sense we are dealing with the formation of cultural identities understood not as essentializations (although part of their enduring appeal is that they are seen and are considered to be like essentializations) but as contrapuntal ensembles, for it is the case that no identity can ever exist by itself and without an array of opposites, negatives, oppositions.

122 See above, Chapter Three.

Modernity's emergence is the direct outcome of the haphazard process of regional system incorporation into the Modern World-System.

However, if we shift our attention to the West Indies, a very different view of Modernity's originary emerges. Completely obviated by Said, there exists a parallel or 'double' discourse to Orientalism, which is Occidentalism. It is this discourse that has constituted the substantive content of this chapter; as we have seen, it constitutes 'one of the most powerful strategies in the imaginary of the modern/colonial system for providing dichotomies that justified the will-to-power.'¹²³ Once again, it is the historical particularities of the TimeSpace dimensions of the Modern World-System that provides the basis for a fuller understanding. In an almost diametrically opposed manner to the East Indies, the 'West Indies'—a generic term for the entirety of the South and Central American regional sub-systems—were forcibly and directly incorporated into the Capitalist World-Economy almost immediately following the original Iberian penetration. Contra Said, it was the 'discovery' and subsequent *conquista* of the West Indies that served as the pivotal 'events' that provided the temporal origins of *la longue duree*; 'Amerindia... constitutes the foundational structure of the first Modernity'¹²⁴ For World-Systems Analysis, 'Modernity began in 1492 with Europe thinking itself the centre of the world and Latin America, Africa, and Asia as the periphery.'¹²⁵

There are three necessary preconditions for the emergence of a viable and self-sustaining world economy, on either the regional or global level: (i) geo-spatiality, the geographical extension of the market to a 'world scale'; (ii) 'variegated methods' of labour-control, attenuated to local conditions within the overall axial division of labour; and (iii) strong state mechanisms. 'The Americas were essential to the first two of the three needs. They offered space, and they became the locus and prime testing ground of the variegated methods of labour control'—in the 'long' 16th century, this meant slavery.¹²⁶ Not only did the Modern World-System temporally emerge with the incorporation of the Americas, it was the 'failed' hegemon Spain that served as its historically necessary progenitor; precisely because Spain was geo-strategically blocked from territorial penetration/incorporation throughout the then current regional sub-systems (by the Ottomans in the Mediterranean,

123 Mignolo, *Local Histories/Global Designs*, 337.

124 Enrique Dussel, 'Beyond Eurocentrism: The World-System and the Limits of Modernity', in Frederic Jameson and Masao Miyoshi (eds), *The Cultures of Globalization* (Durham: Duke University, 1998), 3–31 at 11.

125 Dussel, *The Invention of the Americas*, 132.

126 Anibal Quijano and Immanuel Wallerstein, 'Americanity as a Concept, or the Americas in the Modern World-System', *International Social Science Journal* (1992), 549–58 at 549. The newly peripheralised West Indies 'used forced labour (slavery and coerced cash-crop labour)'; first from the Amerindians and, later, from the imported commodified Africans. Wallerstein, *The Modern World-System I*, 103. On the significance of slavery for the *modernity* of 'primitive accumulation', see below, this chapter.

the Portuguese in Africa), it was forced to fall back onto the desperate gambit of a *westerly* penetration of the 'East'.

Spain had only one opportunity left: to go toward the centre, to India, through the *Occident*, through the West, by crossing the Atlantic Ocean. Because of this, Spain bumps into, finds without looking, Amerindia, and with it the entire medieval [i.e., 'pre-modern'] paradigm enters into a crisis (which is the paradigm of a peripheral culture, the farthest western point of... the interregional system), and thus inaugurates, slowly but irreversibly, the first *world* hegemony. This is the only world-system that has existed in planetary history, and this is the modern system, European in its centre, capitalist in its economy.¹²⁷

Dussel makes a powerful argument for the centrality of the TimeSpace dimensions for the successful gestation of *la longue duree*; 'This enormous space and population will give to Europe, centre of the world-system, the *definitive competitive advantage* with respect to the Muslim, Indian and Chinese worlds.'¹²⁸ The structural effects of the introduction of this radical dis-continuity were twofold. Firstly, it is the 'long' 16th century, the conjuncture time of Iberian hegemony, which serves as the template for the emergence of the cultural construct of Modernity. The resultant artefact is both relational and instrumental in nature. Europe's identity as Self, antithesis to the Other, is rooted both in the radical anti-essentialism of the World-Economy as well as the concomitant necessity to exercise effective governance over it in order to guarantee a self-sustaining rate of surplus extraction: ceaseless capital accumulation. This ultimately implies that the originary of Euro-centric Universalism is not an endogenous phenomenon, but an exogenous one.

The culture of the *centre* of the 'world-system', of the first world-system, [was] through the incorporation of Amerindia, and as a result of the *management* of this 'centrality'. In other words, European modernity is not an *independent*, autopoietic, self-referential system, but is instead *part* of a world-system, in fact, its *centre*. Modernity, then, is planetary... in this planetary paradigm [Modernity] is a phenomenon proper to the system 'centre-periphery'. Modernity is not a phenomenon of Europe as an *independent* system, but of Europe as centre. This simple hypothesis changes the concept of Moder-

127 Dussel, 'Beyond Eurocentrism', 12.

128 Ibid.

The modern world-system was born in the long sixteenth century. The Americas as a geo-social construct were born in the long sixteenth century. The creation of this geo-social entity, the Americas, was the constitutive act of the modern world-system. The Americas were not incorporated into an already existing capitalist world-economy. There could not have been a capitalist world-economy without the Americas.

Quijano and Wallerstein, 'Americanity as a Concept, or the Americas in the Modern World-System', 549.

nity, its origin, development, and contemporary crisis, and thus, also the context of the belated modernity or post-modernity.¹²⁹

Secondly, Modernity, by means of the antithesis between Self/Other, is inseparable from a hyper-atrophied self-consciousness, the delineation of its Self grounded upon ultimately nothing other than this self-same orientation towards the Other.

The theoretical-philosophical thought of the sixteenth century has contemporary relevance [for us] because it is the first, and only, that lived and expressed the originary experience during the period of the constitution of the first World-System. Thus, out of the theoretical 'recourses' that were available [which included primitive legal scholarship]... the central philosophical and ethical question that obtained was the following... *what right has the European to occupy, dominate and manage the recently discovered cultures, conquered by the military, and in the process of being colonized?*²¹³⁰

If this understanding of Modernity (as-polarisation) is correct, then it becomes immediately obvious that not Orientalism but Occidentalism acted as the first discursive signifier of 'Europe', which is now identical with the centre of a modern/colonial world-system. The East Indies, because of their (relatively) successful postponement of incorporation, simply could not serve as the trigger for a paradigmatic crisis necessary to cause a transformative shift in cultural self-consciousness.¹³¹ Only the penetration/incorporation/peripheralisation of the West Indies could have played such a world historical role. Without

Occidentalism there is no Orientalism, and Europe's 'greatest and richest and oldest colonies' are not the 'Oriental' but the 'Occidental': the *Indias Occidentalis* and then the Americas. 'Orientalism' is the hegemonic cultural imaginary of the modern world-system in the *second modernity* [i.e., 'The Enlightenment'] when the image of the 'heart of Europe' (England, France, Germany) replaces the 'Christian Europe' of the fifteenth to mid-seventeenth century (Italy, Spain, Portugal)¹³²... Occidentalism, in other words, is the overarching geo-political imaginary of the modern/colonial system, to which Ori-

129 Dussel, 'Beyond Eurocentrism', 4. For discussion of the lingering elements of Eurocentrism within Post-Structuralism, see above, Chapter Two.

130 Ibid. 15.

131 Anghie has conclusively demonstrated the relevance of the Self/Other dichotomies within the Americas for the gestation of International Law. 'The essential point is that international law, such as it existed in Vitoria's time, did not *precede* and thereby effortlessly resolve the problem of Spanish-American relations; rather, international law was created out of the unique issues generated by the encounter between the Spanish and the Indians.' Anghie, *Imperialism, Sovereignty and the Making of International Law*, 15.

132 Mignolo, *Local Histories/Global Designs*, 57. Strikingly, Mignolo omits any mention of Holland in his otherwise exhaustive list. The significance of this, and of Grotius'

entalism was appended in its first radical transformation, when the centre of the system moved from the Iberian Peninsula to the North Sea, between Holland and Britain.¹³³

If we were to take Post-Colonial critique to the very furthest degree possible, we would argue that the central discursive apparatuses of Modernity—Euro-centrism and Universalism—are nothing other constructions of the self-reflective consciousness of the originary colonial difference now posited and continued by other means.¹³⁴ Insofar as Modernity is temporally inextricable from Colonialism and Imperialism, both Critical Theory and World-Systems Analysis can discursively appropriate it as the structural instantiation of Geo-Culture, the multi-dimensional discursive apparatus of the Modern World-System.¹³⁵ The historical conjuncture, in Braudelien terms, between Modernity, the Americas, and an Occidentalist paradigm of Self/Other, gives rise, in turn, to that proliferation of interior/exterior borders that Mignolo has read as the master-sign of the modern/colonial world-system:¹³⁶ “The “discovery” of Amerindia, of its integration as periphery, is a *simultaneous* and *constitutive* fact of the restructuration of Europe *from within* as centre of the only new world-system that is, only now and *not before*, capitalism (first mercantile and later industrial).¹³⁷

A ‘double movement’ within and outside of Europe between Self and Other constitutes the genesis of Modernity; once again, Iberia is the geo-spatial locus of this conjunctural History. As I have already discussed in Chapter Two, the foundation of Iberian *imperium* in the West Indies was paralleled, or ‘doubled,’ by an internal territorialist re-configuration throughout the Iberian frontier centred upon the infinitely ambivalent *conversos*; the implementation of conquest in the West Indies by the Spanish and the initial penetration of the East Indies by the Portuguese served as a deferred continuation of the crusading warfare against the

role as ‘mid-wife’ overseeing this intra-modern transition in his historical agency of the last primitive legal scholar, will be discussed below, this chapter.

133 Ibid. 59. ‘Orientalism, in other words, was a particular re-articulation of the modern/colonial system imaginary in its second phase, when Occidentalism, structured and implemented in the imaginary of Spanish and Portuguese empires, began to fade away.’ Ibid. 61.

134 Dussel, *The Invention of the Americas*, 12:

The birthdate of modernity is 1492, even though its gestation, like that of fetus, required a period of intrauterine growth. Whereas modernity gestated in the free, creative medieval cities [the Italian communes], it came to birth in Europe’s confrontation with the Other. By controlling, conquering, and violating the Other, Europe defined itself as discoverer, conquistador, and colonizer of an alterity like-wise constitutive of modernity. Europe never discovered this Other... as Other but covered over... the Other as part of the Same, i.e., Europe. Modernity dawned in 1492 and with it the myth of a special kind of sacrificial violence which eventually eclipsed whatever was non-European.

135 Simplifying somewhat, this is the central argument of Said’s *Culture and Imperialism*, xi–61.

136 See above, Chapter Two.

137 Dussel, ‘Beyond Eurocentrism’, 25.

Moor/Infidel within the Mediterranean sub-system. What links both moments, each the mirror image of the other, is the highly problematic and historically contentious figure of the *conquistador*. In a highly provocative but compelling argument, Dussel has re-presented the *conquistador* as a paradigm of Modernity's dichotomous self-consciousness; the '“I-conquistador” forms the protohistory of Cartesian *ego cogito* and constitutes its own subjectivity as will-to-power.'¹³⁸

Admittedly, it is somewhat counter-intuitive to offer Henan Cortes and his fellows as the 'first modern individuals'; it smacks somewhat of a kind of 'dark' Hegelianism.¹³⁹ Yet, it undeniably achieves a requisite degree of plausibility when one recalls the cataclysmic rapacity that signified the foundational conjuncture of the Modern World-System within the West Indies. If ceaseless and unlimited capital accumulation truly is the master-sign of the Capitalist World-Economy, then the conquistador may not at all implausibly be put forward as its very first 'historical agent'; 'Even capitalism is the fruit, not the cause, of Europe's world extension and its centrality in the world-system. When one conceives of modernity as [an exogenous] part of [a] centre-periphery system instead of an [endogenous] independent European phenomenon, the meanings of modernity, its origins, [and] development... change.'¹⁴⁰

The vital nexus between Post-Colonial critique and the TimeSpace dimensions of the Modern World-System is the Self's encounter with Other is of an anti-dialectical nature, the Other effectively obliterated as the Self-Same. Here, we directly encounter the 'darker side of the Renaissance', Universalism as negation; the Other was thus 'constituted as part of the Same. The modern *ego* was both in its self-constitution over against regions it dominated... The Other is a rustic mass dis-covered in order to be civilized by the European being... of occidental culture. But this Other is in fact covered over... in its alterity.'¹⁴¹

138 Dussel, *The Invention of the Americas*, 43; see also *ibid.* 74: the '*I conquer* which culminates in the *ego cogito* or the will-to-power.'

139 *Ibid.* 26:

The European ego or subjectivity, immature and peripheral to the Muslim world, continues to develop [throughout the 'long' 16th century]. Finally, it surfaces in the person of Henan Cortes presiding over the conquest of Mexico, the first place where this ego effects its prototypical development by setting itself up as lord-of-the-world and will-to-power.

140 *Ibid.* 11.

141 *Ibid.* 36. In this respect, Anghie's assessment of Vitoria is mis-directed; 'Vitoria's work exemplifies, I argue, the formulation and operation of the dynamic of difference, and this at the very beginning of the discipline of international law' Anghie, *Imperialism, Sovereignty and the Making of International Law*, 9. The exact opposite prevails; what Vitoria is actually 'tracing' is the 'dynamic operation' of the (Self-) Same. Anghie's mis-categorisation, I would argue, is derived from his confusion of 'difference' with *difference*; a genuine or authentic encounter with the Other—true *difference*—is the absence of the presence of Universalist discourse. Yet Anghie, precisely because he fails to take this vital distinction into account, is left with portraying Vitoria—and, by implication, all of the other primitive scholars—as somehow 'falling away'

This is immediately cognisable in the logic of the dangerous supplement at work in both Victoria's and Grotius' Occidental/Orientalist discourse; both are marked by the Presence of Colonialism and expropriation. It is also directly invocative of my discussion in Chapter Two of Koskenniemi's critique of hegemonic International Law; the *sub rosa* manoeuvre by which the particular/subjective successful re-presents itself as the universal/objective. The historical entity of the *conquistador*, as the bearer of both the particular and the universal can now be usefully re-constructed as the negating vanguard of a dichotomous Modernity; 'For the modern *ego* the inhabitants of the discovered lands never appeared as Other, but as the possessions of the Same to be conquered, colonized, modernized, civilized, as if they were the modern *ego's* material.'¹⁴² The genocidal

from their originary authenticity of 'difference'. Hence the following—and entirely un-characteristic—naïvete: 'These conclusions [regarding *ius bellum* against the Aboriginal 'un-believers'] stand in curious juxtaposition to other parts of Vitoria's work, where he emphasizes the humanity of the Indians.' Ibid. 27.

- 142 Dussel, *The Invention of the Americas*, 35. It was the Aborigine's perceived inability to effectively demonstrate *libertas* that the Civic Humanists held as the most objectionable manifestation of natural slavery, signifying the absence of both objective and subjective *ius*. Unsurprisingly, Aristotelians such as Sepulveda repeatedly cited the indigenous system of communal property as the master-sign of 'un-freedom'.

Many are deceived, but not I, since I regard the [aboriginal] institutions as proof of the Indian's rudeness, barbarity (*ruditatem barbariem*), and innate servitude. Natural necessity induces human beings to build houses, rationalize some behaviours, and engage in some species of commerce. That the Indians do these things proves that they are not bears or monkeys, and are not totally devoid of reason... On the other hand, in their republic no individual is entitled to own a house or a field or to bequeath it as a testament to descendants. Everything belongs to their lords, whom they improperly name kings, and whose judgements they follow more than their own. They submit completely to their king's capricious will without being coerced and forfeit their own liberty voluntarily and spontaneously. This abasement signals the servile, abject spirit of the barbarians. The barbarous, uneducated, and inhuman character and customs (*ingenio ac moribus*) of these half-men (*homonculos*) pre-existed the arrival of the Spaniards.

Cited in Dussel, *The Invention of the Americas*, 64–5. As Dussel comments, 'For Sepulveda the root of indigenous barbarity lies in its non-individual mode of relating to persons and things. The Indians knew nothing of positive possession (*ut nihil cuiquam suumsit*), personal inheritance contracts, and, above all, modernity's supreme characteristic: subjective liberty (*suae libertati*), autonomously resistant to the arbitrariness of rulers.' Ibid. 65. To translate Sepulveda's comments into the terms of twenty-first-century speech: the Indians are natural slaves because they are communists. Clearly, this is exactly the type of sentiment that we would expect to see expressed within an early capitalistic society that is just beginning to acclimatise itself to the categorical imperative of unlimited and ceaseless capital accumulation.

The Same violently reduces the Other to itself through the violent process of conquest. The Other, in his or her distinction, is denied as Other and is obliged, subsumed, alienated, and incorporated into the dominating totality like a thing or an instrument. This oppressed Other ends up either being interned (*encomendado*) on a plantation or hired as a salaried labour on estates (*haciendas*) or, if an African slave, regimented

depletion of the West Indies perfectly complemented Spain's juro-theological discourse of *imperium* and territorialism, the discursive sign of Absolutism and the ultimate historical failure of the 'first' hegemon.

The Portuguese and the Spanish had invented... Wallerstein's *world-system*, which spread its clutches worldwide and consumed its new sacrificial victims in every corner of the earth. A kind of mimetic desire prompted each conquistador to hunt what every other conquistador hunted, even though such greed resulted in civil wars such as that between Pizarrists and Almagrists in Peru. During the period of capitalism's originary accumulation, this mimetic desire inspired these first modern individuals to horde without limits the universal medium of the new system, money.¹⁴³

Lurking within the similitude between *Conquista*/Modernity and *Conquistador*/Self is, of course, a dangerous supplement. Both sets of signs signify the presence of primitive or original accumulation as the logic of the dangerous supplement to the Capitalist World-Economy; 'In actual history, it is notorious that conquest, enslavement, robbery, murder, briefly violence, play the greater part.'¹⁴⁴ Not very surprisingly, then, 'primitive accumulation plays approximately the same role in political economy as original sin does in theology.'¹⁴⁵ Marx himself clearly posits an exact equivalence between Capitalism and the systematic expropriation of the New World, offering up in the process his own ironical and subversive counterpoint to Smith.

But the accumulation of capital presupposes surplus-value; surplus-value presupposes capitalist production; capitalist production presupposes the availability of considerable masses of capital and labour-power in the hands of commodity producers. The whole movement, therefore, seems to turn around in a never-ending circle, which we can get out of by assuming a primitive accumulation (the 'previous accumulation' of Adam Smith) which precedes capitalist accumulation; an accumulation which is not the result of the capitalist mode of production but its point of departure.¹⁴⁶

The Capitalist World-Economy, if it constitutes a true system, must, of necessity, be de-noted as a *savage* one.

The discovery of gold and silver in America, the extirpation, enslavement, and entombment in mines of the aboriginal population, the beginning of the conquest and plunder

into factories turning out sugar or other tropical products. Likewise, the conquistador constitutes and extends his own subjectivity through his praxis.

Dussel, *The Invention of the Americas*, 39.

¹⁴³ Ibid. 116.

¹⁴⁴ Karl Marx, *Capital: A Critique of Political Economy, Volume One*, with Introduction by Ernest Mandel, trans. Ben Fowkes (London: Penguin Books, 1990), 874.

¹⁴⁵ Ibid. 873.

¹⁴⁶ Ibid.

of the East Indies, the turning of Africa into a warren for the commercial hunting of black skins, are all things which characterize the dawn of the era of capitalist production.¹⁴⁷

The Euro-centrism of the Marx's theory of primitive accumulation has already been critiqued in Chapter Two. The difficulty with applying it to the sort of deconstructive critique undertaken here is that Marx appears to deploy the construct as a form of Teleology: primitive accumulation appears as 'primitive', 'because it forms the pre-history of capital, and of the mode of production corresponding to capital.'¹⁴⁸ The TimeSpace dimensions of Marxism are inherently suspect; the 'Pre-Modern' is equated with 'Pre-History', both of which are posited as being sequentially prior to the emergence of 'true' temporality, Capitalist Modernity; hence, 'the pejorative connotation of its adjective as primitive pre-history.'¹⁴⁹ Recent critical scholarship, however, in opposition to orthodox neo-Marxism and rejecting the economic reductionism logically entailed by linear temporality, has undergone a deconstructive turn and suspended the teleological implications of the original reading of the term. Instead, primitive accumulation is understood as persisting within contemporary 'capital relations, as its constitutive pre-positing action.'¹⁵⁰ A new interpretative model, the 'continuous-inherent' theory of original accumulation has been offered, which effectively 'deconstructs' the objective demarcations between Capitalism and 'Pre-Capitalism'. The Presence of original accumulation within Capitalist Modernity, in turn, signifies the foundational continuity between the Modern and the Pre-Modern.

Primitive accumulation, is, in fact, the foundation of the capitalist social relations and thus the social constitution through which the exploitation of labour subsists. In other words, contemporary developments of primitive accumulation¹⁵¹ are not 'chance' developments. The argument, then, is that permanent accumulation is a permanently reproduced accumulation. It is the condition and presupposition of capital's existence. In short, primitive accumulation, be it in terms of the renewed separations of new populations from the means of production and subsistence, or in terms of the reproduction of the wage relation in the 'established' relations of capital... primitive accumulation is the social constitution of capitalist social relations.¹⁵²

147 Ibid. 915. In his most rhetorical flourish, Marx declares that 'If money, according to Augier, "comes into the world with a congenital blood-stain on one cheek", capital comes dripping from head to toe, from every pore, with blood and dirt.' Ibid. 926.

148 Ibid. 875.

149 Werner Bonefeld, 'History and Social Construction: Primitive Accumulation is Not Primitive', *The Commoner*, March 2002, at <http://www.thecommoner.org>, 1.

150 Werner Bonefeld, 'The Permanence of Primitive Accumulation: Commodity Fetishism and Social Construction', *The Commoner*, September 2001, at <http://www.thecommoner.org>, 7.

151 Such as the forcible military expropriation of global petroleum reserves.

152 Ibid. 1.

If we are correct in identifying the master-sign of original accumulation as the historical process of the systematic separation—or 'alienation'—of producers from the means of production,¹⁵³ then it becomes eminently plausible that the mechanisms of original accumulation 'do not belong only to the prehistory of capitalism, they are contemporary as well. It is these forms of primitive accumulation, modified but persistent, to the advantage of the centre, that form the domain of the theory of accumulation on a world scale.'¹⁵⁴

At this point, Deconstruction proves to be a very useful analytic tool. As I have already argued, it is highly tempting—although ultimately misleading—to view Deconstruction as a superior form of dialectic.¹⁵⁵ The non-linear nature of original accumulation subverts the originary foundation of Capitalism/Modernity within Marxism itself; if Capitalism is not truly self-grounding as a mode of production, it must, out of an ontological lack or absence, repeatedly 'return to its beginnings.'¹⁵⁶ This is exactly what the (continuous) Presence of original accumulation signifies: 'The systematic character of primitive accumulation is constitutive. It does not refer to a specific chronology but is rather a process of continuously re-constituted new 'beginnings.'¹⁵⁷ Rather than dialectical synthesis attaining the 'suspension' or transcendence of the earlier form,¹⁵⁸ the alternative 'continuous-inherent' theory points to a kind of trans-historical alterity, with original accumulation serving as the arche-trace for Capitalist Modernity. Once again, the 'extra-economic' nature of original accumulation proves crucial.¹⁵⁹

The historicity contained in [original accumulation] is revealed not so much by the fact that primitive accumulation occurs *before* the capitalist mode of production—although this is *also* the case—but that it is the *basis*, the presupposition, the basic precondition which is necessary *if* capital accumulation must occur... This is because if primitive accumulation is defined in terms of the preconditions it satisfies for the accumulation of capital, its temporal dimension includes in principle both the period of the establishment of a capitalist mode of production *and* the preservation and expansion of the

153 See above, Chapter Two.

154 Samir Amin, *Accumulation on a World Scale: A Critique of the Theory of Underdevelopment* (New York: Monthly Review Press, 1974), 3.

155 See above, Chapter Two.

156 Bonefeld, 'History and Social Construction: Primitive Accumulation is Not Primitive,' 4.

157 Ibid. 5.

158 'In other words, the notion that the essence of primitive accumulation is suspended (*aufgehoben*) in accumulation proper [i.e., 'modern'] means that the principle of primitive accumulation, that is separation, is raised to a new level, rendering primitive accumulation as a specific epoch historically redundant.' Ibid. 4.

159 See above, Chapter Two.

capitalist mode of production *any time the producers set themselves as an obstacle to the reproduction of their separation to the means of production.*¹⁶⁰

The *conquistador* as progenitor of Modernity: 'Barbarism amounts to a form of primitive accumulation within the established relations of capital.'¹⁶¹

The anti-dialectical nature of the arche-trace, in turn, suggests the Modern World-System as a more congenial model of global capitalist social relations for better explaining the otherwise puzzling continuation of allegedly archaic production practices. The enigma vanishes the moment we recall the teleological TimeSpace correlation Marxism establishes between pre-modern time and extra-European space. The continuous Presence of original accumulation becomes intelligible once it is no longer possible to separate the European Self from the non-European Other; if the Self is no longer truly self-grounding, then it is possible for it to be constituted within the present as the primitive. The example of the slave trade, previously alluded to, affords an outstanding example of how original accumulation may operate through

[T]he interaction between North and South, an international division of labour, the destruction of African communities, and enslavement. Marx was of course very well aware of these forms [of production]. Therefore, in this case, the 'historical process of separating the producers from the means of production' revealed characteristics and dimensions quite different from the stereotypical representation of land enclosure portraying the passage from 'feudalism' to 'capitalism' in Europe. Here primitive accumulation is consistent with an understanding of the capitalist economy as *a* world economy, in a Braudelian sense... in which accumulation in one place may correspond to primitive accumulation in another place, in which the *ex novo* production of the separation can be the condition of the *reproduction* of the same separation in another interlinked place.¹⁶²

To conclude. The investiture of Grotius-as-Author(-ity) with Post-Colonial significance is concomitant with the re-de-notation of *De iure Praedae* as *De Indis*. This de-notational shift signifies Grotius as a disseminating figure in the emergence of Occidentalism as the foundational discursive formation of the first Modernity. Grotius' identity as the 'last' primitive legal scholar, therefore, is neither accidental nor incidental; it is critical to his identification *as* Author(-ity). The de-constructive approach to his authorial presence is complemented perfectly by the TimeSpace dimensions of Braudelian and World-Systems History, which, I argue, hold the interpretative key to historical re-construction. Grotius/Author/Text are embedded within three concentric circles of differential temporal dimension. The gestation of the Modern World-System—*la longue duree*—con-

160 Massimo de Angelis; Marx and Primitive Accumulation: the Continuous Character of Capital's "Enclosures", *The Commoner*, September 2001, at <http://www.thecommoner.org> at 12–13.

161 Ibid. 7.

162 Ibid. 10–11.

stitutes the structural history that is the arche-trace for *De Indis*. The more immediate conjunctural time is the moment of transitional hegemonic succession from the 'failed' hegemon of Iberia to the first 'true' hegemon of Holland/United Provinces. Rhetorically, this conjuncture is expressed through the discursive formation of Republicanism, which constitutes the trace of *De Indis*. Finally, the event is the composition of the Text itself, whose originary act of *écriture* is a 'little treatise on Indian affairs', *De rebus Indicis*. Borschberg has recently identified for us the precise temporal moment of the 'event': Grotius' reception of a copy of Vitoria's *De Indis* from an anonymous director of the VOC.¹⁶³ Therefore, it is the twin anchors of the Indies, both equally subject to the political logic of the early Capitalist World-Economy, that provide the originary grounds through which the signature discursive stratagem of the Text—the discursive oscillation between the dominant pole of Late Scholasticism and the repressed pole of Civic Humanism—takes place. It is precisely through this migratory rhetoric, between contending ontologies 'thick' and 'thin' but both equally embedded within the foundational holist normative order of *ius naturale*, that Grotius may be clearly recognised as the last of the primitive rather than the first of the classical legal scholars, and, therefore, a 'seminal' Author of the emergence of a Modernity that is the Self-Same to the modern/colonial world-system. This is re-enforced by *De Indis*' repeated movement away from the 'pure' Humanism of Gentili towards the modified neo-Realism of Vitoria, a strategic manoeuvre inextricable from the material(ist) configurations of the Indian Ocean world system. In contrast, the true beginnings of Classical Legal Scholarship may be succinctly categorised as the precise metaphysical inversion of these two poles, with a heteronomous Naturalism gradually being absorbed into the relatively inferior position of the repressed pole, a space previously occupied by a now privileged Civic Humanism. The alleged 'progressive secularisation' of International Law, erroneously attributed to Grotius, is, in fact, little more than the expansive monopolisation of apologetic Humanism of the dominant pole of international legal discourse. In this way, the transition from Primitive to Classical Legal Scholarship was only to be completed by the full establishment of the Modern World-System—the *civitas maxima* of Christian Wolff¹⁶⁴—signified by the transition of the core zone to the juro-political form of Absolutism, 'the first international State system in the modern world.'¹⁶⁵ As this book has attempted to demonstrate, it is certainly not

163 Peter Borschberg, 'Grotius, the Social Contract and Political Resistance: A Study of the Unpublished *Theses LVI*,' Institute for International Law and Justice Working Paper 2006/7, History and Theory of International Law Series, 1–83 at 14.

164 Wilhelm G. Grewe, *The Epochs of International Law* (New York: Walter de Gruyter, 2000), 358–9.

165 Perry Anderson, *Lineages of the Absolutist State* (London: Verso, 1974), 11. Which, in turn, directly facilitated the dispossession of Indigenous Peoples. As Williams has powerfully expressed it,

post-Reformation Europe's 'radical' notion of a secularised Law of Nations obligatory upon all men must be recognized as relying on that same system of categories animat-

the case that International Law entered into some sort of post-ontological state sometime during the early modern period of the 'long' 16th century. Rather, contemporary international jurisprudence, perpetually bound to a recurrent migration between contending poles of *differance*, merely constitutes one more metaphysical construction, but one that has forgotten how to speak its own name.

ing the central orientating myths of the European medieval era... Transformed from their medieval context, the categories of unity and hierarchy are now embodied in the chimera of a secularised world society, governed by the rationalized norms articulated in the European Law of Nations. Therefore, while the desacralized tenor of Renaissance and early Discovery-era legal discourse indicated a shift of apparently radical dimensions in European legal thought, the status of non-Christian peoples within this Eurocentrically-conceived matrix of power and knowledge remained, of necessity, subordinated in a head-long process of antiquation.

Williams, 'The Algebra of Federal Indian Law', 241–2.

Conclusion

The New Law of the Earth

The surgical operation of deconstruction was always directed at the identity of the ontological violence that sustains the western metaphysical and ideological systems with the force and actual violence that has sustained the western actors in their colonial and imperial politics, a structural relation of power that had to be teased apart if it was ever to be overturned.

(Robert J.C. Young)

Deconstruction is a nasty, bloody, and savage business. This is just another way of saying that it fully belongs within the realm of the historical.

The purpose of this book has been to offer an original critical reading of Grotius' *De Indis*, employing the diverse methodologies of Critical Legal Theory, in particular those of Deconstruction, Post-Colonialism, and World-Systems Analysis. My approach has been 'nomadic'; I have actively migrated among the contending discourses looking for common and intersecting areas of concern and similarities in, or similitudes of, approach. Not only has this allowed me to undertake an extended inter-textual exegesis of *De Indis* and its fellow Texts—both within and without of the Grotian corpus—but it has also enabled me to demonstrate the potential theoretical and practical benefits of seeking an interstitial 'common ground' between the competing schools. In this way, I have struggled to achieve my own form of border thinking, a predicament forced upon me after I assumed the task of 'explaining' an early 17th century legal text that, on the basis of my subjective reading, was an equal amalgamation of Colonialism and Republicanism. My purpose, therefore, has been neither strictly empirical nor archival, although clearly I have sought for a degree of residual but objective historical plausibility for my view of *De Indis*. The recent work by Borschberg and van Ittersum, as well as a veritable small wave of forthcoming publications on all aspects of the historical, biographical, and textual aspects of Grotius would have made any effort within these domains on my part largely redundant. Instead, I have resolutely 'read' Grotius and *De Indis* from the perspective of my own disciplinary matrix of New Stream legal scholarship and used this reading as a means of demonstrating the hermeneutical value of this approach—and, hopefully, in the process arriving at something interesting and original to say about Grotius. I like to think that the recent resurgence of interest in the 'miracle

of Holland' is due to the very factor that I have identified in this book—the growing awareness of Colonialism as the dangerous supplement to International Law and International Politics.

Yet, just like the Author under my de-constructive gaze, whom I have subjected to numerous, and at times painful 'incisions', my own purposes began to widen considerably beyond that of my own more modest original intent. In the process of writing this book, I have come to undertake a full-scale de-construction of Grotius as a proto-typical figure of an enlightened Modernity, both the sign and signifier of that utterly ambivalent construct known as the Grotian Heritage. Perhaps the most arresting moment in my own process of textual inflation came with the realization that self-styled Modernity is radically *continuous* with the equally nebulous concept of the Pre-Modern. Deconstruction, by illuminating the governing absence of all hierarchical differences present within the orthodox (self-) understanding of western philosophy, subverts all allegedly objective demarcations between the pre-modern and modern worlds. The 'Modern' is revealed as dangerously supplemented by the lurking—and, more importantly, the *lingering*—presence of the 'archaic'. The important point is that Deconstruction is not the reified mode of hyper-abstract reasoning that its detractors frequently take it to be, but is an intensely *visceral* form of thought, intimately bound up with issues of both temporality and power. Deconstruction—or 'Destruction'—is about violence. So is International Law, most overtly in its early or 'primitive' form. The de-notation of early International Law as 'primitive' is highly revealing for this very reason—is the identified element of 'primitiveness' the transparent centrality of violence, or 'Just War', that occupies the privileged position within the so-classified Texts? Even more subversive is the conjunction between violence and ontology. I have shown that Kennedy's argument concerning the preoccupation with metaphysics as a sign of the primitive legal text is correct; yet, is not the invocation of ontology absolutely necessary if violence is to be re-presented as 'natural' right? I argue that it is the un-dialectical antinomies of Deconstruction—Self/Other, *difference*, the logic of the dangerous supplement—that allows for the 'un-covering' of the hitherto suppressed linkages of continuity—the 'dangerous supplements'—among the modern/colonial system, international public order, and global governance, subverting the facile teleological progressivism of mainstream legal and political discourse; 'There is a totalitarian bent of modernity that presents the other side, coloniality, as something to be overcome [dialectically 'suspended'] when, indeed, coloniality cannot be overcome by modernity, since it is not only its darker side but its very *raison d'être*.¹

My argument invokes neither 'nihilism', nor—to use an even more obnoxious term in this era of the infinitely open-ended 'war against terror'—'cultural relativism'. It does, however, touch directly upon the Nietzschean principles implicit within Post-Structuralist analysis that power is the progenitor of value; or, to use Foucault's more precise formulation, that value is generated precisely

1 Walter D. Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, & Colonization*, 2nd edn (Ann Arbor: the University of Michigan Press, 2003), 486.

within the discursive fields created by power/knowledge. The foundational moment of Primitive Legal Scholarship was the discursive appropriation and subsequent re-articulation of 'The Indies'. Primitive Legal Scholarship and the Modern World-System were co-constituted by an identical originary act. Like all originary acts, however, this one proved to be neither self-grounding nor internally unified, but signified instead an endless *differance*. This, in turn, forces us to return to the question of the Title as the de-notation of the Text. If, in Braudel's language of TimeSpace, *respublica christiana*, the international system of the 17th century, is outside or without 'structure', the *De iure Praedae* may serve well as the Title; the Text does nothing more than legitimise—apologize *for*—the VOC in its transition from defensive to offensive *ius bellum*. However, the alternative Title, *De rebus Indicis/De Indis*, is both the sign and the signifier of a more structured and structuring mode of international and interstitial space(s). A more complex and interesting chain of signifiers is forged with the differential Indies/Indians as the originary ground(s). *De Indis* allows us to uncover the Other and its temporal incorporation into a World-System of the Self-Same as the foundational act of International Law. In my de-construction ('destruction?') of *De Indis*, the arche-trace of the Text is posited as the Modern World-System. This structuration of interstitial space(s) signifies the presence of structural time, *la longue duree*, which is grounded upon the event of discovery and the conjuncture of incorporation/peripheralisation. In a double movement from World (-System) to Text, the conjuncture time of the Text is the hegemonic succession within the early or mercantile-capitalist phase of *la longue duree*; the event time of the Text its *écriture*, signified by the presence of two discursive strata: Republicanism (the trace) and the ontological oscillation between contending forms of *ius naturale* (the discourse).

The 'East/West Indies' is the primary sign-system of both sets of signifiers, both World (-System) and Text. The vital nexus that links the two dominant approaches of this study—Deconstruction and World-Systems Analysis—is both temporally and spatially centred upon the Post-Colonialist construction of 'Americanness', the material and the discursive appropriation of the 'West Indies' by the 'Grotian' core-zone of the early Modern World-System. It is, in truth, the implicit hierarchy and Universalism present within this double act of appropriation/incorporation that affects the transit from the latent Colonialism of the late medieval *orbis universalis christianus* to the manifest Coloniality of *respublica christiana*. Historically central to this transit was Iberia, the dual bearer of both Habsburg *imperium* and the Late Scholasticism of the School of Salamanca. This 'untidy' convergence of Theology with Coloniality/Modernity created a tension-laden set of discursive formations in which the Spaniards had inherited the post-Augustinian objective of 'maintaining the authority of God while liberating man from God's control.'² Iberian Coloniality signified the Modernity of the Renaissance but could only be ideologically legitimated within the express terms of the theo-political. This interminable *frisson*, in Mignolo's

2 Mignolo, *The Darker Side of the Renaissance*, 431.

view, constituted a vital link of continuity between the allegedly 'Early Modern' and the autonomously self-grounding Modern 'properly' defined.

During the Renaissance [the cultural sign of the 'long' 16th century] the 'discovery' [of the West Indies] was integrated into the Christian macro-narrative; during the Enlightenment the 'discovery of the Indian Occidentales' was paired with the 'passage to the Indias Orientales', via the Cape of Good Hope and integrated into the emerging narrative of political economy [i.e., the Capitalist World-Economy]. The first stage was the narrative that accompanied the Spanish Empire, while the second was the narrative that mainly corresponded to the interests of England and France. The significant switch from the darker side of the Renaissance to the darker side of the Enlightenment was precisely in the conversion from legal theology to political economy.³

Or, in my own preferred mode of expression, the 'switch' lies within the discursive oscillation from a 'thick' juridical ontology to a 'thin' one; Modernity/Coloniality as the systematic secularisation of the theological originary.

Within this complex chain of signs and signifiers, Americanness forms a central component of Modernity, an 'erection of a gigantic ideological overlay to the modern world-system. It established a series of institutions and world-views that sustained the system, and it invented all of this out of the American crucible.'⁴ The sets of signs, inherently hierarchical and universalist, signifying the 'New World' within the World-System are, respectively, Ethnicity, Racism, the 'cult of the modern' and, in the most generic of manners, Coloniality itself. It is Coloniality, operating through Americanness, which serves as the temporally embodied instauration of the arche-trace of International Law.

Coloniality was essentially the creation of a set of states [the 'core zone'] linked together within an interstate system in hierarchical levels. Those at the very bottom were the former colonies. But even when former colonial status would end, coloniality would not.⁵ It continues in the form of a socio-cultural hierarchy of European and non-European. It is important to understand that *all* the states in this interstate system were new creations—from those at the top to those at the very bottom.⁶

As Anghie reminds us, 'Law encounters great difficulties in coherently redressing naturally arising inequalities of power.'⁷ Accordingly, international public order

3 Ibid. 449.

4 Anibal Quijano and Immanuel Wallerstein, 'Americanness as a Concept, or the Americas in the Modern World-System', *International Social Science Journal* (1992), 549–58 at 552.

5 For a discussion of the linkage between Coloniality-as-camouflage and the *sub rosa* perpetuation of Colonialism as neo-Colonialism, see above, Chapter Two.

6 Ibid. 550.

7 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 241.

is juridically regulated by the 'dynamic of difference',⁸ the eternal recurrence of colonialist structures and practices re-formulated within a nominally 'post-imperialist' order. Anghie's own work is exemplary in this regard, constantly revealing the repressed continuities between the Colonial, the Neo-Colonial, and the allegedly 'Post-Colonial'.⁹ The Mandate System of the League of Nations,¹⁰ the governance paradigms of the World Bank and the International Monetary Fund,¹¹ humanitarian intervention and international Human Rights Law,¹² and the ubiquitous 'war on terror',¹³ all signify the reproduction of a juridical hierarchy that is the sign of a Modernity which doubles as the site of the endless re-production of Coloniality. As Anghie's admirable work demonstrates, this is nowhere more evidenced than with the 'progressive' implementation of the Mandate System. Anghie clearly perceives the 'Vitorian' dimensions of the instauration of the Trusteeships, mimetically replicating the Late Scholastic discourse of Indigenous Peoples.¹⁴ Predictably, the 20th century witnesses the 'repeat' of the discursive and material displacement of the designated 'ward' that took place in the 'long' 16th century. In Anghie's account

The Mandate System, having transformed the native and her territory into an economic entity [i.e., the colony], proceeded to establish an intricate and far-reaching network of economic relationships that connected native labour in a mandate territory to a much broader network of economic activities extending from the native's village to the terri-

8 Ibid. 311-20.

9 'The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of natural sovereignty. In reality its economic system and thus political policy is directed from outside.' Kwame Nkrumah, cited in Robert J.C. Young, *Postcolonialism: An Historical Introduction* (Oxford: Blackwell, 2001), 46. For my own treatment of this phenomenon, see above, Chapter Two.

10 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 115-95. For a Post-Colonial critique that directly influenced Anghie's, see Siba N'Zatioula Grovogui, *Sovereigns, Quasi-Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996), 111-42.

11 Anghie, *Imperialism, Sovereignty and the Making of International Law*, 196-224.

12 Ibid. 245-72.

13 Ibid. 273-309.

14 Ibid. 144-5:

In looking within their own discipline for jurists who could act as a foundation for such a humanist [humanitarian?] project [as the Mandate System], the League lawyers returned to the work of Vitoria. They focused in particular on his argument that the Indians were the wards of the Spanish, and that the Spanish governance of the Indians was to be dictated at all times by the interests of the latter... The circle was complete: in seeking to end colonialism, international law returned to the origins of the colonial encounter. It is hardly surprising, then, that virtually every book written on the mandate makes some reference to Vitoria's work.

tory as a whole, to the metropolis and, finally, to the international economy. Integrated in this way into a dense and comprehensive network of economic power [i.e., the Capitalist World-Economy], the native—and, indeed, the entire mandate society—became vulnerable to the specific dynamics of the network. Given that the mandate system was inserted into this system in a subordinate role, its operation inevitably undermined the interests of mandate peoples.¹⁵

Note how this account exactly parallels the trace effects of Americanness as outlined by Quijano and Wallerstein.

The hierarchy of coloniality manifested itself in all domains—political, economic and not least of all, cultural. The hierarchy reproduced itself over time, although it was always possible for a few states to shift ranks in the hierarchy. But a change in rank order did not disturb the continued existence of the hierarchy... Thus it was the very efforts of those at the bottom of the rank order to overcome their low ranking [that] served in many ways to secure the ranks further. The administrative boundaries established by the colonial authorities had had a certain fluidity in that, from the perspective of the metropole, the essential boundary-line was that of the empire vis-à-vis other metropolitan empires. It was decolonisation that fixed the stateness of the decolonised states.¹⁶

In this way, Modernity/Coloniality is doubly constituted as both the sustained pattern and the sustaining arche-trace of international legal discourse.

The event of the Grotian Moment rhetorically articulates the first wholly cognisable mode of global governance, one that is imbricated within a hierarchical Universalism: 'Coloniality was an essential element in the integration of the interstate system, creating not only rank order but sets of rules for the interactions of States with each other'.¹⁷ Through its very precise nexus with Coloniality, the heterogenous originary of Modernity, *De Indis* manages a double-movement of its own, constituting the fulfilment of primitive legal scholarship while 'doubling' as the foundational originary of the supposedly 'Modern' paradigm of International Law. Consistent with my deconstructive critique, the Colonialist dimensions of the Grotian Heritage compel us to acknowledge the fundamental *continuity* between forms and practices that we would ordinarily—and falsely—dichotomize as 'Modern' and 'pre-Modern'.¹⁸ The de-construction/destruction of temporal

15 Ibid. 180.

16 Quijano and Wallerstein, 'Americanness as a Concept', 550.

17 Ibid.

18 Mignolo, *The Darker Side of the Renaissance*, 435:

The 'modern World-System' was not restricted to the history of western colonisation or to European history since the fourteenth or sixteenth century; rather, it was a history in which everybody participated and the differential of power was established. The so-called system (in the terminology of the 1970s) is indeed a web of power relations (economic, legal, political) that creates a ranking among 'sovereign' states—that is, in the interstate 'system' whose logic has remained constant since the sixteenth century.

demarcation, the site of the alleged sign of an essential difference, highlights the latent susceptibility of the equally essentialising spatio-cultural 'division' between European/Western and non-European/non-Western to Post-Colonialist critique. The result is that it was precisely 'the originary of the modern/colonial world that began to build on the idea of western civilization without which there would not (could not) have been a modern/colonial world system. Thus the imaginary of the modern/colonial world was the grounding of the very idea of western civilization.'¹⁹ Mignolo de-notes this imaginary complex 'Occidentalism,' the iterable discursive fusion of universalist Euro-Centrism with an equally universalist Modernity/Coloniality; the 'idea of western civilisation, western logocentrism, and the like, is a consequence and necessity of the modern/colonial world as the modern/colonial world was articulated in the growing imaginary of western civilisation, and so on.'²⁰ This discursive iterability between Modernity and Coloniality is signified by two parallel chains of signs, temporally sequential to but mimetically invocative of each other. The first operates on the macro-level, signifying the discursive and material transit of the Modern Colonial World-System from the sign of 'Christianisation' to 'Civilization' to 'Globalisation.' The second is restricted to the micro-level, signifying the border reasoning governing the interpenetration between what Mignolo respectively de-notes as 'Local Histories' and 'Global Designs.'

The first macro-level movement is inextricable from the instauration of the arche-trace of the Modern World-System during the failed Iberian hegemony of the 'long' 16th century. The discursive apparatus of Late Scholasticism, culminating in the event of the Grotian Moment, established the narrative and ontological contours of Modernity/Coloniality upon expressly theo-political foundations.

The first drive toward globalisation and the construction of the modern/colonial world system was under the impetus of the *orbis universalis christianus*, which was the consolidated with the defeat of the Moors, the expulsion of the Jews, and the 'discovery' of America. The second movement, replaced the legacy of the Christian mission with the civilizing mission, when a new type of mercantilism developed in Amsterdam [i.e., the Dutch cycle of systemic accumulation] and prepared the ground for the emergence of France [the para-hegemon of the 18th century] and England [the 'true' hegemon of the 19th century] as new imperial powers. If the civilizing mission was the secular version of the Christian one, the religious version didn't vanish but coexisted with the former, playing a secondary role.²¹

For Mignolo's 'co-existence' I would substitute 'mimesis,' as the latter term is more consistent with Deconstruction. Allegedly 'secular' forms of thought and *écriture*, consciously understood to be successfully self-grounding, are, in fact,

19 Ibid. 328.

20 Ibid.

21 Walter D. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2000), 280.

constitutive of the imitative replication of the theological imaginary. The connective link between the two forms of discourse—one ontologically ‘thick’, the other ‘thin’—is that both entail the invocation of Presence, a self-determinative transcendental essence that assigns identity, fixes hierarchy, and polices discourse. In this way, key signs that signify the presence of the metaphysically ‘real’ become transferable, or iterable, between the supposedly contending discursive formations; the ‘Christian mission was predicated on the conversion of the planet to Christianity, while the civilizing mission was entrenched with the secular concept of reason, with the rights of men and citizens.’²² The two referential signs that remain constant throughout the temporal succession of movements are, of course, Universalism and Euro-centrism. Within both the post-Augustinian Christian meta-narrative and Modernity/Coloniality, Christendom/Europe remains the privileged locale of the emergence of all the signs of the Real/Presence within TimeSpace. It is this discursive continuity between the missionary and the civilizing that is central to Gong’s seminal account of the ‘civilizational standard’ within International Law.

One element of the Christian tradition which the trend towards secularisation not only maintained but intensified was the universality manifest in the biblical imagination to take the good news [i.e., Liberalism] to every nation. Christianity’s universalist aspirations were easily transformed into notions of a universal civilization which would progress by adhering to scientific principles. Progress towards civilization would come as the universal laws of physics, chemistry, and biology were applied despite the myriad surface *manifestations* of the different cultures. Thus, the ‘civilizing’ mission was born. It remained a moral crusade, with all of the self-confidence and zeal that many thought that Christian reformers were losing in the face of a secular science challenge.²³

Civilization, culminating in Globalisation—that is, Civilization rendered co-terminate with the objective parameters of TimeSpace—corresponds perfectly

22 Ibid. 281. Grovogui makes a similar assertion.

This process of non-European alterity was represented in three genres of discourse that depended for their forms on three different historical periods. The first genre arose in the ecclesiastical context of the discovery of the New World in the fifteenth century. The second genre emerged during the era of the Enlightenment and owed its form to a hierarchy of peoples and civilisations. The third genre, also the colonial discourse, was a product of nineteenth-century natural history and imperialism.

Grovogui, *Sovereigns, Quasi-Sovereigns, and Africans*, 21. See also, *ibid.* 21–42.

23 Gerritt W. Gong, *The Standard of ‘Civilization’ in International Society* (Oxford: Clarendon Press, 1984), 51. It is interesting to speculate whether the adoption of the missionary impulse by Liberalism actually occasioned the rise of Scientism, the universal reduction of complexity to mathematical quantification. If there exists a normative transcendental necessity to ‘change’ the world but Religion proves too weak a vessel, then Science must seek to ‘re-place’ it: an outwardly visible sign of a cultural unconscious at work. This is, of course, a quintessentially Nietzschean point: what is the ‘value’, as opposed to the nature, of Truth?

with the sequential penetration, incorporation, and peripheralisation of the non-European non-core zones by the Euro-centric core zone: if all markets are to be rendered fully penetrable by the Capitalist World-Economy then a universalist ideology of legitimation must be in place to yield a uniform geo-culture. A public international order grounded upon Liberalism is unable to tolerate the lingering presence of the illiberal State, as such entities thwart the universalist impulse to render Liberalism/Capitalism and TimeSpace exhaustively co-determinate.

Accordingly, Civilization and Globalization are practically negotiated along a wide variety of 'fronts' or 'borders' involving micro-level times²⁴ and spaces²⁵ that Mignolo de-notes as a heterogenous locale of Global Designs versus Local Histories. The universalist dimensions of Modernity/Coloniality propagate a series of meta-narrative Global Designs that are selectively shaped and applied to facilitate the successful incorporation of diverse communities of heterogenous entities, each locally governed by their respective qualitatively divergent History.²⁶ Consistent with Americanness, the historical progenitor of hierarchical Universalism, Racism has proven to be one of the most widespread of Global Designs. Far from being a deviant by-product of Modernity, Racism is of absolutely central importance to the 'Enlightenment Project' if the identification of Modernity with Coloniality is a successful one.

In his discussion of the Mandate System contained within his pivotal work *Imperialism, Sovereignty and the Making of International Law*, Anghie adopts his own variant of Deconstruction, one premised upon Foucauldian rather than Derridean principles as is the case with my own work. In a fascinating excursus on the pragmatic administration of the mandated trusteeships of the League of Nations—which he provisionally identifies as the site of the emergence of Developmentalism—Anghie outlines the parameters of a wide-ranging Power/Knowledge complex that, in effect, permitted the formation of the 'trustee-sovereign' as the legitimate subject of international legal discourse.²⁷

24 Mignolo, *Local Histories/Global Designs*, 283.

25 Ibid. 285.

26 In Mignolo's own words,

What I am arguing for... is the coexistence of successive global designs that are part of the imaginary of the modern/colonial world system. Changing global designs transforms the structure of the coloniality of power within the imperial conflict and the logic of the modern world system. Successive global designs rearticulated the system, reorganized the structure of power, redrew the interior borders and traced new exterior ones. Asia and Africa, for instance, colonised by France and England at the end of the eighteenth and the beginning of the nineteenth centuries, established a new world in relation to previous colonial relations between France and England in North America and the Caribbean. For that reason, Jamaica is not India and Martinique is not Algeria.

Ibid. 280-1.

27 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 162-90.

The transference of sovereignty to non-European peoples, as undertaken by the Mandate System, was simultaneous with, and indeed inseparable from, the creation of new systems of subordination and control administered by international institutions... Formal sovereignty is based on the existence of effective government; and government as conceptualised with regard to the mandate territories, was created principally for the purpose of furthering a particular system of political economy [i.e., the Capitalist World-Economy] that integrated the mandate territory into the metropolitan power, to the disadvantage of the former.²⁸

Seen in this way, Racism may be de-constructed as instituting the dangerous supplement to the Enlightenment 'idols' of Progress, Freedom, and Equality: 'the *singular* and grounding metaphysical belief that European humanity is properly speaking isomorphic with the humanity of the human *as such*.'²⁹ The presence of Global Designs, in turn, invites a response from the periphery resisting incorporation, assuming the form of sites of contestation and opposition, known as 'Local Histories' which closely correlate with Wallerstein's concept of anti-systemic movements. The phenomenon that both Mignolo and Wallerstein describe clearly equates to the notion of tactical resistance pioneered by Foucault with his

28 Ibid. 179. The invocation of Foucault provides a useful supplement to my own approach. Here, Anghie is largely following the earlier work of Grovogui.

My position substantiates three essential points made by Michel Foucault in *The Order of Things*. The first is that the classical episteme, to which the Renaissance theory merely contributed a new configuration, created the hierarchies underlying international relations and its norms. Second, although international law did not emerge as a distinct discipline until the seventeenth century, it has depended upon the same original script as the classical episteme, genesis, to constitute its subjects and objects. Third, international law functions, like the classical episteme, through an allotment of signs to particular perceptions, thoughts, and desires that it represents as universal.

Grovogui, *Sovereigns, Quasi-Sovereigns, and Africans*, 16.

29 Tsency Serequeberhan, cited in Emmanuel Chukwadi Eze, 'The Colour of Reason: The Idea of "Race" in Kant's Anthropology', in Emmanuel Chukwadi Eze (ed.), *Postcolonial African Philosophy: A Critical Reader* (Oxford: Blackwell Publishers, 1997), 103-40 at 130. As Eze amply demonstrates, a Euro-centric anthropology served as the keystone for the entirety of Kant's philosophical system.

Kant rejected Hume's radical scepticism and sought within the structures of human experience fixed, permanent and enduring structures that would ground moral actions as *law*. *The Critique of Reason* and the subsequent *Critiques* can be studied not only from a negative standpoint of showing what is impossible for pure reason but, from the anthropological perspective, as a positive attempt to find in the subjectivity of the human structure a specifically human, inner *nature* upon which to found moral existence as necessary.

Ibid. 108. 'Necessary' as in a necessary condition to be met for the 'identification' of the truly human. The sliding move from anthropological essentialism to 'Liberal millenarianism', as described in Chapter One, is an absurdly easy one to make and requires no further elucidation.

theory of the ‘micro-capillaries of power.’ From this perspective, ‘Culture’ is the form of Local History in which

[G]lobal designs are enacted or where they are adapted, adopted, transformed and rearticulated... local histories are mediated by the structure of power—more specifically by the coloniality of power that articulates the colonial difference between local histories projecting and exporting global designs and local histories importing and transforming them.³⁰

The antagonistic juxtaposition between global designs and local histories, each embedded within the TimeSpace of the Modern World-System grounded upon unlimited and ceaseless capital accumulation serves as the locale for the endless recurrence of *violence*.

If Critical, or ‘New Stream,’ international legal scholarship is to have a future—that is, if it is to maintain its ability to mount a comprehensive and subversive critique of hegemonic ‘mainstream’ International Law while upholding its relevance for contemporary developments—it must incessantly labour to reformulate its diverse discursive nexuses with both Deconstruction and Post-Colonialism. Conversely, the future of that amorphous construct known as ‘Post-Structuralism,’ if it has not already been superseded, will depend very much on its ability to enter into a practically useful symbiotic exchange with the equally amorphous but somewhat better materially grounded construct of ‘Post-Colonialism.’ This is all the more the case if one of my central premises turns out to be correct: that the current hegemon has entered into the ‘B’ phase of irreversible decline, forcing a concomitant transformation of international legal culture—the re-presentation of the historical object of international legal discourse, the ‘Other,’ into the ‘Enemy.’ Exercises of subversive and critical interrogation of epistemological constructions and certitudes, central to de-constructive praxis, are now re-invested as with the highest degree of relevance conceivable, given that the late hegemonic ‘war on terror’ is concomitant with an unconditional onslaught against political dissent, multi-culturalism, social plurality, and moral relativism. The ‘war on terror’ that, semantically, is the systemic elimination of the subjective state of fear, rests upon nothing else than the re-installation of objectivist Euro-centric Universalism as absolute and totalising Presence.

This monograph constitutes a single and somewhat experimental effort to facilitate such a cross-fertilisation of anti-Universalist discourses and rhetorical stratagems. The overriding political objective of my Text, hopefully free from restrictive normative bias or ‘prejudice,’ has been to illuminate the inherent politicisation of Natural Law that forms the dangerous supplement to contemporary International Law. My case study has been the ‘lurking’ Republicanism of the Grotian juvenilia in general and that within *De Indis* in particular. If I were to look beyond the narrow confines of this study and issue a more general pronouncement upon the relevance of the Grotian Heritage

30 Mignolo, *Local Histories/Global Designs*, 278.

for New Stream scholarship, it would be that the Grotian Text constitutes an unparalleled example of the protean nature of *ius naturale*. What separates *De Indis*, the early masterpiece, from the far better known *De Iure Belli ac Pacis*, the 'mature' master-work, lies precisely within the rhetorical and textual space(s) containing the contending re-presentations and tactical deployments of Natural Law, operating within the antagonistic traces of Republicanism and Absolutism. In the earlier Text the discursive subject is the heterogeneity of the republican/corporate constitutional order centred upon the inter- and intra-state dimensions of the narrative 'protagonist', the VOC. Out of rhetorical necessity *De Indis* employs Late Scholasticism as the dominant pole of discourse, the relatively 'thick' ontology of neo-Thomism the form of metaphysics most suitable for the pluralisation of judicial identity and legitimate political agency. In the later Text, the discursive subject is the legal obligation(s) of the Absolute State under the terms of Just War; here, the narrative protagonist is the wholly public *Civitas*. Accordingly, we witness a substitution of Civic Humanism as the dominant pole of discourse, with 'thin' ontology expressly fore-grounded as the extra-judicial basis for international public order. The inverted rhetorical stratagems between the two Texts neatly parallels their respective but incommensurable positions within the geo-spatial. *De Indis*, as its Title signifies, is concerned with the lawful agency of the of the core-zone actor within the penetrated but not yet incorporated periphery, the 'Orientalist' East (ern) 'Indies'. The imaginary of Coloniality—the non-European, non-Western, non-Christian—proliferates within the Text, compelling a concomitant re-formulation of the taxonomic categories of *dominium* and *imperium* so as to provide a comprehensive framework for the lawfulness of the agency of the Corporate Sovereignty, 'State' and/or 'Company', within the juridical space of *res extra commercium*. *De Ius Belli ac Pacis*, by contrast, by contrast, is spatially centred within the core zone; the juridical presence of *respublica christiana*, the discursive sub-Text, is a 'taking-for-granted' that both permits and compels a shift towards the imaginary of the *Civitas*, embedded within the trace of a residual Christendom, now 'Europe'. Modernity/Coloniality governs both Texts, the former explicitly the latter implicitly. When placed side by side in an inter-textual fashion, the discursive oscillation that accounts for the differences between the two Texts clearly replicates the iterable ascending and descending mode of argumentation that governs the internal structure of each. *De Indis* and *De Iure Belli ac Pacis* each constitutes a 'composite' pole within a single but tension-laden inter-textual discourse.

This, I would argue, is the real significance of the event of the Grotian Moment: the implicit duality of Natural Law, its iterable applicability for both an emancipatory and a reactionary jurisprudence, stands revealed in all its savagery.

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